Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Petitioner,

v.

FLAT CENTER FARMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal law preempts assessment of the Montana state corporation license tax on a Montana business corporation doing business within the Fort Peck Indian Reservation on the grounds that such assessment is presumed preempted absent express Congressional authorization, that the enrollment status of one of the corporation's Indian shareholders is shared by the corporation, and that the corporation is not "carrying on business in" the State of Montana?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the opinion and judgment of the Montana Supreme Court entered on June 21, 2002.

OPINIONS AND ADMINISTRATIVE ORDERS BELOW

The Supreme Court of the State of Montana is the court of last resort in Montana. The Court filed its Opinion on June 21, 2002, reported at *Flat Ctr. Farms, Inc., v. Dep't of Revenue*, 2002 MT 140, 310 Mont. 206, 49 P.3d 578. (App. 1-23). The Montana Fifteenth Judicial District Court, Roosevelt County, filed its unreported Order Granting Petitioner's Motion for Summary Judgment on March 30, 2000. (App. 24-27.) The State Tax Appeal Board (STAB) of the State of Montana filed its unreported Findings of Fact, Conclusions of Law, Order and Opportunity for Judicial Review on July 19, 1999. (App. 28-40.) The Montana Department of Revenue issued its unreported Final Agency Decision on July 17, 1998. (App. 41-45.)

JURISDICTION

The Montana Supreme Court judgment sought to be reviewed was entered on June 21, 2002. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C.A. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 8, clause 3, of the United States Constitution (the Indian Commerce Clause) provides that Congress has the authority:

> To regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes.

Article VI, clause 2, of the United States Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

28 U.S.C.A. § 1257 provides in pertinent part that:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

Section 15-31-101 of Montana Code Annotated (1993) provides in pertinent part that:

> (1) The term "corporation" includes associations, joint-stock companies, common-law trusts and business trusts which do business in an organized capacity, and all other corporations whether created, organized, or existing under and pursuant to the laws, agreements, or declarations of trust of any state, country, or the United States.
>
> (2) The terms "engaged in business" and "doing business" both mean actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.
>
> (3) Except as provided in 15-31-103 or 33-2-705(4) or as may be otherwise specifically provided, every corporation engaged in business in the state of Montana shall annually pay to the state treasurer as a license fee for the privilege of carrying on business in this state such percentage or percentages of its total net income for the preceding taxable year at the rate hereinafter set forth.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The case below was decided on stipulated facts, which were incorporated verbatim in the STAB decision. (App. 29, App. 30.) Prior to 1993, Kim Murray conducted his

farming operations as an individual and his individual income was not taxed by Montana. (Stipulated Facts, ¶ 8; App. 30.)[1] Kim and Denise Murray, husband and wife, own the corporate stock in equal shares. (App. 29.) Mr. and Mrs. Murray are both Indians, though only Mr. Murray is an enrolled member of the Fort Peck Tribes, the Reservation on whose lands the shareholders are resident and the corporation conducts its business. (App. 29.)

In 1993, Kim Murray made the business decision to incorporate his farming operation as Flat Center Farms, Inc. (D.C. Doc. 7 at 2.) The corporation tax year in issue is 1993-94. In 1996, Mr. Murray appeared before the tribal council and asked for tribal council "incorporation," obtaining a resolution "approving" Flat Center Farms, Inc. as a tribal corporation "to avoid being taxed by the State of Montana" (D.C. Doc. 3; STAB Doc. 7, Ex. B.) There are no facts in the record regarding whether the Fort Peck Tribes tax this private corporation. The Tribes were not a party to any proceeding below.[2] There are no facts on the record regarding any other connection between the corporation and the Tribe other than that the corporate operations are located on the Reservation, one of its shareholders is an enrolled tribal member, and some of the land leased by the

[1] Montana did not seek to tax Mr. Murray's individual income under *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (a state may tax the income of all of its residents, regardless of the situs of the activity generating the income, but it cannot tax enrolled tribal members residing outside the state's taxing jurisdiction in Indian Country).

[2] The Tribes filed an amicus curiae brief in support of Flat Center in the Montana Supreme Court.

corporation is land owned by the Tribe, some being trust land. (App. 29, 30.)

On July 12, 1996, the Montana Department of Revenue (Petitioner) issued a Notice of Assessment to Respondent pursuant to the Montana corporation license tax and interest provisions for the tax year ending October 31, 1994. On August 8, 1996, Respondent protested the assessment, asserting immunity from state taxation because the shareholders are Indians and the corporate operations are on the reservation and seeking final agency review by the Petitioner's Director. (App. 41-45.) In the Department's July 20, 1998 final agency decision, the Director affirmed the assessment on the grounds that "[Flat Center] is a Montana corporation incorporated under the laws of Montana, and doing business within the State of Montana." (App. 42.) "While the shareholders of this corporation are enrolled members of an Indian tribe and exempt from Montana income tax, the corporation is neither a Native American nor an enrolled member of any Indian tribe." (App. 43.)

Respondent appealed the Director's decision to the STAB on the stipulated facts. (App. 29, 30.) The STAB upheld the Director's decision on the basis that "a corporation is a separate entity from its creators, owners or shareholders" and that "incorporation is a business decision which carries with it certain benefits to the incorporator, including some degree of protection from legal action against its shareholders, directors, etc. and some tax and financial advantages." (App. 38.) The STAB further noted that the private corporation was not created to promote tribal interests, but rather was stipulated to have been created for the sole purpose of farming as a for-profit

corporation. It noted that the recognition of the corporation by the Tribes was no more than a recognition of its existence as a corporate entity. (App. 38.)

Respondent appealed to the Montana district court, again claiming exemption from state taxation because of immunities and privileges under federal law arising from the Indian status of the shareholders and the location of the business operation. The Petitioner defended the assessment on the basis of federal corporate and Indian law. The district court summarily reversed the STAB. In a three-page opinion, the Montana district court held that the tax status of the corporation was to be determined from the record as a whole and that the primary factor in determining taxability of a corporation is the situs of the activity being taxed, not just the status of the individual as enrolled or non-enrolled. (App. 25.) The district court concluded that the determinative facts were that the operations were on the reservation and the beneficiaries of the corporate business were Indians. The Montana Supreme Court upheld the district court opinion based on an erroneous interpretation of federal Indian preemption principles. (App. 1-23.)

II. PRESENTATION AND PRESERVATION OF FEDERAL QUESTIONS

A. The Parties Asserted Federal Questions in Each Level of Review, and the Court's Decision is Based on Its Erroneous Interpretation of Federal Law.

This Court has jurisdiction to review and reverse the Montana court decision, which directly conflicts with the United States Court of Appeals for the Sixth Circuit, the

court of last resort for the state of North Dakota, and several decisions of this Court. Respondent asserted its challenge to the tax assessment on the basis of federal law in each level of appeal from the agency assessment to the Montana Supreme Court. Petitioner defended the tax on the basis of federal law and the Montana Supreme Court ruled on the basis of its erroneous interpretation of this important issue of federal law.

Respondent's initial appeal before the STAB asserted: "It is well settled in the United States that individual income earned by an Indian person and derived wholly from reservation sources is exempt from state taxation," citing *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). (App. 58.) Respondent also relied on the Montana Supreme Court's decision in *LaRoque v. State of Montana*, 178 Mont. 315, 583 P.2d 1059 (1978), which had acknowledged the primacy of federal law. (App. 58.) ("The principle of *McClanahan* is thus controlling. . . . " *LaRoque*, *supra* at 322).

Petitioner asserted before the STAB that the Respondent is voluntarily incorporated in Montana and the corporation is separate from its shareholders for taxation purposes, relying on *Moline Properties v. Commissioner of Internal Revenue*, 319 U.S. 436 (1943). (App. 55.) Respondent is, therefore, a non-Indian for purposes of the federal Indian preemption analysis and there is no federal law bar to its taxation by the state. The Indian status of the shareholders is not relevant to the taxability of the corporation and the situs of the farming operation is not of itself a bar to state taxation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). (App. 54, 56, 57.) (D.C. Doc. 3; STAB Doc. 8 at 10, 11.)

The Petitioner further argued that under several of this Court's decisions, "state laws may be applied [on Indian reservations] unless such application would interfere with reservation self-governance or would impair a right granted by federal law. . . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) and that Respondent had stipulated to no facts relating to tribal sovereignty other than the situs of the farming business. (App. 56, 57.)

The STAB affirmed the assessment on the basis that Respondent "is a separate legal entity from its creators, owners or shareholders," "does not have status as an individual Indian," and that Respondent's income is subject to the state corporation license tax pursuant to Montana Code Annotated § 15-31-101 (1993). (App. 38.)

In the petition for judicial review of the STAB's decision before the Fifteenth Judicial District, Roosevelt County, Respondent moved for summary judgment relying on, inter alia, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973) and *LaRoque*, *supra*. (D.C. Doc. 7.) Before the district court, Petitioner raised the same federal questions it had raised before the STAB. (App. 51-53.)

The district court reversed the STAB's decision, concluding that the "situs of the activity is the primary factor in determining whether state taxation jurisdiction exists, not the status of the individual as enrolled or non-enrolled," *citing LaRoque v. State of Montana*, 178 Mont. 315, 583 P.2d 1059, 1063 (1978). (App. 24-27). The district court relied on a totality test, rejecting as "mere form over substance" the distinction between corporate and Indian

status, observing that "the beneficiaries are Indian, the corporation is recognized as a tribal corporation, and operates wholly within the reservation and on Indian owned lands." *Id.*

The Petitioner appealed the district court decision to the Montana Supreme Court. Its appeal was expressly "limited to questions of federal law;" asserting that "[f]ederal Indian law gives the State the right to impose taxes on nonmembers doing business on reservation land." (App. 47-50.)

The Petitioner asserted that this Court's jurisprudence, including *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), limits federal preemption from state taxation to "reservation Indians" and "reservation lands," and requires application of a legal incidence test, rather than a beneficiary test, for economic burden of state taxes. The Petitioner contended that: the tax was on corporate income, not "reservation lands;" that the question of federal preemption of state taxes required a particularized inquiry under, inter alia, *Cotton Petroleum*, *supra*, and that Congress had not preempted Montana's authority to impose a tax on non-members doing business on reservation land leased from the tribe, its members, or the United States in its capacity as trustee. *Id.*

Further, the Respondent was not a "reservation Indian" because the Respondent corporation was not an enrolled member of the reservation on which the activity took place, but rather a separate legal entity first incorporated in Montana. Therefore, the state could not be held to be federally preempted from taxing Respondent without a

particularized inquiry into the state tribal and federal interests which the district court on summary judgment had not done. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *Id.*

The Petitioner also argued that a corporation is taxed separately from its shareholders and that its status did not flow through to the state corporation, citing *Moline Properties v. Commissioner of Internal Revenue*, 319 U.S. 436 (1943), and *Baraga Products, Inc. v. Commissioner of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd*, 156 F.3d 1228 (6th Cir. 1998), unpublished opinion reported at 1998 U.S. App. LEXIS 17498. (App. 47, 49.)

The Montana Supreme Court concluded that Respondent was exempt from the Montana corporation license tax because "the coalescence of situs (reservation) and status (Indian) which guides the traditional analysis is present." (App. 11.) The Court disregarded the corporate status and treated Respondent as an enrolled tribal member Indian. The Court did not determine where the legal incidence of the tax fell, but instead held that the Indian status of the taxpayer was only one factor relevant to the analysis; that the most important factor is the situs of the activity taxed. The Court held that the State was preempted from taxing activities in Indian country without express Congressional authorization, citing a presumption of interference with the tribal rights of Indians to make their own laws and be governed by them, *citing Williams v. Lee*, 358 U.S. 217, 220 (1959) (App. 6), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). (App. 5.) The Court held that "[t]he exercise of state jurisdiction over activities occurring entirely on Indian lands is an infringement on inherent tribal authority and is contrary to principles of self-government and tribal sovereignty. *Williams v. Lee*,

358 U.S. 217, 220-23, 79 S. Ct. 269, 271-72, 3 L. Ed. 2d 251." (App. 6.) The court rejected this Court's recent rulings and relied on an unworkable and subjective test that should be expressly overruled.

B. There is No Adequate and Independent State Ground Supporting the Decision Below.

1. The Parties' Contentions Were Based on Federal Law.

Before the Montana Supreme Court, Respondent relied on federal law, including primarily *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) and *Mescalero Apache Tribe v. Jones*, *supra*. (App. 46.) The Petitioner unambiguously appealed on the basis of federal law. "The issues here are limited to questions of federal law. . . . " (App. 47.) As noted above, both parties had relied on federal law both before the STAB and the district court.

2. The State Court Decision is Based on the Court's Interpretation of Federal Indian Law.

The Montana court expressly relied on its understanding of federal Indian law in its decision. Where the court's opinion expressly relies on federal law, this Court has jurisdiction to review and reverse the decision. *Washington v. Chrisman*, 455 U.S. 1, 5 n.2 (1982); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). The Montana court expressly relied on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831); *Williams v. Lee*, *supra*, and other decisions of this Court for its analysis. (App. 6.) It also relied on its 1978 decision in *LaRoque*, which itself was based

entirely on the court's interpretation of federal law; most importantly, the Buck Act, *McClanahan*, and *Williams v. Lee*, *supra*. (*LaRoque*, *supra*, at 322-25). (App. 9-11.) Thus, the decision below could not be found to rest on adequate state grounds. (*See LaRoque*, inter alia, at 320-25.) *LaRoque* rests on what is now an incorrect interpretation of federal law, which this Court can and should correct. *See* Stern, Gressman, Shapiro, Geller, *Supreme Court Practice* (7th ed. 1993) at 143-52.

The decision below does not cite to any state statutory or other state law that could exempt Respondent from state taxation. The only articulated state law ground is *LaRoque*, a case unquestionably itself founded solely on federal law grounds. Its references to state law are subsidiary and based on its interpretation of federal law. Thus, this Court has jurisdiction to review the decision. Stern, *supra*. To the extent the ruling is based in part on state law, the law is so interwoven as to be inextricable, and the state law grounds are not, therefore, adequate for purposes of defeating this Court's jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

REASONS THE COURT SHOULD GRANT THE PETITION

SUMMARY OF THE ARGUMENT

The Montana Supreme Court has wrongly decided an important federal issue of an immunity from state taxation of a privately-held Montana corporation doing business on the Fort Peck Reservation in Montana, claimed to arise under the United States Constitution under the Indian Commerce Clause and Supremacy Clause. The

Montana Supreme Court's decision directly conflicts with the decisions of the Court of Appeals of the Sixth Circuit and the court of last resort of the State of North Dakota. It conflicts in several respects more generally with the last two decades of this Court's Indian law jurisprudence. Its ruling creates a subjective and unworkable rule for federal preemption of state taxes on Indian-owned privately-held corporations doing business on reservations within states, and it should be reversed.

The salient errors of federal law in the decision are: (1) the Court disregarded the separate tax status of the corporation which voluntarily incorporated under Montana law, and passed through to the corporation the immunity of one of its shareholders; (2) federal Indian law preemption principles do not apply to preempt state tax authority over non-member or non-resident member Indians; (3) federal Indian preemption principles require a determination of the legal incidence of the tax in question. If the legal incidence falls on a non-member, the Court must further conduct a particularized inquiry whether the federal and tribal interests so outweigh the state interests that preemption of state taxing authority may be implied. Thus, federal preemption may not be implied from mere situs and status alone; and (4) the Court erred as a matter of federal law in holding that Respondent does not "carry on business in this state."

I. THE MONTANA SUPREME COURT DECISION CONFLICTS WITH THE COURT OF APPEALS FOR THE SIXTH CIRCUIT AND COURT OF LAST RESORT IN NORTH DAKOTA IN DISREGARDING THE CORPORATE FORM OF THE TAXPAYER AND EXTENDING THE TAX PRIVILEGES OF THE INDIAN SHAREHOLDER TO THE CORPORATION.

In *Baraga Products Inc. v. Michigan Commissioner of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd*, 156 F.3d 1228 (6th Cir. 1998), unpublished opinion reported at 1998 U.S. App. LEXIS 17498, an Indian-owned corporation (Baraga), incorporated under the laws of the State of Michigan doing business on an Indian reservation, contested the imposition of the Michigan single business tax. Baraga challenged the tax, arguing that because Michigan may not tax income generated by Indian-owned property and because 100 percent of the shares of Baraga were owned by James Mayo, an enrolled member of the Keweenaw Bay Indian Community, the state could not by extension tax the corporation. The United States District Court, Western Division, granted summary judgment in favor of the Commissioner, and the Sixth Circuit Court of Appeals affirmed. The Court of Appeals, citing *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), correctly relied on a three-part test for determining whether income is exempt from taxation. "[I]ncome is exempt from taxation when it is (1) earned on an Indian reservation, (2) by an enrolled member of an Indian tribe, (3) who lives on the reservation of the tribe in which the member is enrolled." *Baraga*, 1998 U.S. App. LEXIS 17498, at **5.

Regarding whether the enrollment status of the shareholder can be attributed to the corporation, the Sixth

Circuit relied on *Moline*, *supra*. In *Moline*, this Court held that "The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity . . . the corporation remains a separate taxable entity." *Moline*, at 438, 439 (citations omitted).

Recognizing the inherent differences of a sole proprietorship and corporation, the Court of Appeals found that

> Income of a sole proprietorship is treated as the income of the sole proprietor. *See United States v. Doe*, 465 U.S. 605, 608, 104 S. Ct. 1237, 79 L.Ed.2d 552 (1984). . . . Therefore, if the sole proprietor is an enrolled member of a tribe, so is the sole proprietorship. This is simply not the case with a corporation and is why a corporation that is not itself enrolled cannot attach itself to the shareholder's enrollment status to claim immunity from the tax. It is precisely this lack of oneness that makes adopting the form of a corporation an attractive choice. Shareholders, by maintaining a separate and distinct identity from the corporation are shielded from personal liability for the corporation debts.

Baraga, 1998 U.S. App. LEXIS 17498, at **6-7.

Similarly, in *Airvator v. Turtle Mountain Manufacturing Co.*, 329 N.W.2d 596 (1983), the Supreme Court of North Dakota held that a tribally-controlled business corporation incorporated under North Dakota state law was a non-Indian for a state court jurisdictional analysis. There, the manufacturing company's majority stockholder

was the Turtle Mountain Band of Chippewa Indian Tribe itself, and a major part of the contract in issue was performed on its reservation. Nevertheless, because the business decision had been made to incorporate under state law, *Moline* controlled, and the court treated it as a non-Indian.

The Montana Supreme Court, however, came to an entirely different conclusion than the Court of Appeals and the North Dakota Supreme Court when presented with indistinguishable facts. The Montana Supreme Court failed to discuss or recognize the distinctions between a corporation and a sole-proprietorship. The Montana Supreme Court cited its earlier holding in *LaRoque* for the proposition that "tribal membership is not essential to a determination of whether income earned on the Reservation is taxable." (App. 9, ¶ 18.) The Court concluded that a corporation need not have Indian status in order to be considered exempt from the corporation license tax. Rather, the Court held that, as set forth in its *LaRoque* analysis, greater weight is to be given "to the situs of the taxable income than the status of the income earner." (App. 9, ¶ 19.)

The key issue before the Court of Appeals in *Baraga* and the North Dakota court in *Airvator*, *supra*, and presented for review in this petition for certiorari, is whether a state-chartered corporation can be considered an enrolled member of an Indian tribe based on the enrollment status of its shareholder and the situs of its operations.[3] The Court of Appeals correctly ruled that the

[3] Respondent was not recognized by the Tribes until 1996, fully two years after the tax year in issue. For the period in issue, Flat Center was not recognized as "chartered" by the Tribes.

"general rule" is that "a corporation is an entity distinct from its shareholders," and that "[t]his is particularly true when a corporation is examined for tax purposes." *Baraga*, 1998 U.S. App. LEXIS 17498, at **5.

Because a corporation is a distinct and separate taxable entity, it follows, therefore, that the privileges and tax immunities of Indian shareholders do not flow through to a privately-held business corporation. Felix Cohen, author of the authoritative *Handbook on Federal Indian Law* long ago also concluded that the privileges and immunities of an Indian do not flow through to a privately-held business corporation incorporated under state law. "State chartered corporations, being fictional persons created by the states, should be treated as non-Indians even if owned by Indians." F. Cohen, *Handbook on Federal Indian Law* (1982 ed.) at 355-56. The courts that have addressed this question specifically have, with the exception of Montana, agreed.

II. THE MONTANA SUPREME COURT'S DECISION HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. Federal Law Does Not Preempt Montana's Power to Tax Indians Not Members of the Tribe on Whose Reservations They Reside.

The Montana court simply ignored this Court's authority that federal law does not preempt state taxation of non-member Indians. "Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose

its taxes on Indians not members of the Tribe. . . . Similarly, the mere fact that nonmembers resident on the reservation come within the definition of 'Indian' for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980). *See also*, *Assiniboine & Sioux Tribes of the Fort Peck Reservation v. Montana*, 568 F. Supp. 269, 273 (1983). The Montana court applied exactly the wrong standard in determining that a nonmember was entitled to tax immunity because the shareholders are entitled to receive various Indian program social services delivered on the reservation. (App. 11, ¶ 21.) The court's application of the **presumption** that the State may not tax activities within the boundaries of an Indian reservation (App. 6, ¶ 12) conflicts with this Court's clear line of authority with respect to non-Indians. The State's power to tax is presumed unless prohibited by Congress or preempted by federal law. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 459 (1995); *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 173 (1989) ("more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress.").

The Montana court's application of the wrong legal standard flows directly from its mistaken conclusion that Respondent should be treated as if it were an enrolled tribal member for purposes of applying this Court's decision in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Later decisions of this Court have made clear that this rule does not extend a tax exemption to Indians who do not reside on the reservations in which they are enrolled, *Washington v. Confederated Tribes of the*

Colville Reservation at 160-61, or to corporations organized under the law of a state doing business within the boundaries of a reservation, *Cotton Petroleum*, 490 U.S. 163 (1989). The Montana court's conclusion that Denise Murray, an enrolled member of the Turtle Mountain Chippewa Tribe of North Dakota, and the corporation itself are to be treated as enrolled members of the Fort Peck Tribes for purposes of analyzing the corporation's tax status, directly conflicts also with *Arizona Dep't of Revenue v. Blaze Construction Co.*, 526 U.S. 32 (1999) (holding a Blackfeet corporation is a non-member for taxation analysis of activity on the Navajo Reservation).

The member/non-member error is compounded by the Montana court's failure to follow this Court's explicit directions from *Chickasaw Nation* to determine the legal incidence of the tax, and base the preemption analysis not on an evaluation of the economic burden of a tax, but on its legal incidence. In the case of Montana's tax, Respondent does not dispute that the legal incidence of the tax falls on the corporation, not on the Indian shareholders. Nevertheless, the Montana court disregarded the legal incidence and based its conclusion largely on the fact that the beneficiaries of the corporate income were Indians, albeit one is not a member of the Fort Peck Tribes. The corporation is a creature of state law and any tax exemptions available to its shareholders individually do not inure to the benefit of the corporation. *Moline Properties, Inc. v. Commissioner*, *supra*. Thus, under this Court's decision in *Chickasaw Nation*, "no categorical bar prevents enforcement of the tax." 515 U.S. at 459.

Once the legal incidence is determined, this Court's jurisprudence requires a particularized inquiry to determine whether the federal and tribal interests so outweigh

the state interests that federal preemption of the tax may be implied. This has been so for twenty years. *White Mountain Apache Tribe v. Bracker*, *supra*. For example, the Ninth Circuit conducted a particularized inquiry and found no federal preemption of state taxes on income arising from activities on trust lands, in part because the legal incidence of the taxes was not on the tribe, but on non-Indian consumers or lessees of the Tribe. *Yavapai-Prescott Indian Tribe v. Scott, et al.*, 117 F.3d 1107 (1997), *cert. denied*, 522 U.S. 1076 (1998) (no preemption of state tax on room receipts and food and beverage sales arising in tribally-owned hotel on trust land under federally-approved leases); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (1996) (no preemption of state tax on sales of tickets to sporting and entertainment events at tribally-owned business on reservation); *Loveness v. State ex rel. State of Arizona*, 192 Ariz. 224, 923 P.2d 303 (1998) (no preemption of state tax on income generated on reservation from logging business on reservation).

B. Federal Law Does Not Preempt All State Activity Within a Reservation Absent a Particularized Inquiry or Specific Congressional Action Preempting State Authority.

The Montana court's presumption that the imposition of Montana's tax against Respondent interferes with tribal sovereignty conflicts with numerous recent decisions which require a particularized inquiry into the tribal, state, and federal interests involved to determine whether the state tax is preempted by federal law. *See Cotton Petroleum*, *supra*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *Yavapai-Prescott*,

supra; *Gila River*, *supra*. Respondent never specifically argued that the tax would interfere with tribal self-government, nor did it attempt to present any facts from which such a conclusion would be reached. The Montana court's presumption ignores the important role that states play in providing essential governmental services to reservation citizens, who are, after all, citizens of the state and entitled to such services. The Montana court engaged in no balancing of interest tests, examined no delivery of services calculus, nor did it have facts before it evidencing any strong nexus between tribal health safety and welfare, tribal corporate codes or tax codes, federal economic development or farming regulations and this farming business. As *Cotton Petroleum* and other cases cited above demonstrate, absent an affirmative answer to the *White Mountain* balancing inquiry, federal law does not impair the State's ability to impose a tax.

III. THE FORT PECK RESERVATION IS "IN MONTANA" SO THAT BUSINESSES THERE CONDUCT BUSINESS "IN MONTANA."

The Petitioner concedes that tribal members and the Tribes may not be taxed by the State absent express congressional authorization. The State did not tax Murray's individual income. (App. 30, ¶ 8.) The court's conclusion that the Fort Peck Reservation is not located "within the state" for purposes of application of the tax, however, is contrary to this Court's many holdings that for purposes of state governmental activity, Indian reservations are generally part of the states within whose borders they are found. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001); *Draper v. United States*, 164 U.S. 240 (1896) (Crow Indian reservation located within the State of Montana for

purposes of criminal jurisdiction over crimes between non-Indians); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). Under this Court's decisions, the situs of Respondent's farming activities on leased trust lands does not confer tax immunity. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court upheld the application of New Mexico's oil and gas production tax against a non-Indian corporation producing oil and gas from tribal trust lands leased from the Jicarilla Apache Tribe on its reservation in New Mexico. More recently, in *Nevada v. Hicks*, this Court reaffirmed that reservations lie within the states whose territories surround them. *Hicks* at 361-62.

The Court's conclusion seems to stem from its interpretation of *Williams v. Lee*, *supra*. (App. 6, ¶ 13.) This conclusion, however, ignores the last two decades of this Court's rulings regarding the extent of state jurisdiction on Indian lands. The states retain significant sovereignty and have important state interests in activities on reservations when those activities are undertaken by state citizens – here, a state corporation, within reservations of a state. As this Court recently before clarified:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. **State sovereignty does not end at a reservation's border**. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Peters 515, 561 (1832);" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141, 65 L. Ed. 2d 665, 100

> S. Ct. 2578 (1980) n.4. "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U.S. Dep't of Interior, Federal Indian Law 510, and n.1 (1958), *citing Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1962).

Hicks at 361-62 (emphasis added). Without any other facts in the record, it is erroneous as a matter of federal law to presume an interference with tribal sovereignty from assessment of a tax on a private company that does business on a reservation. *Cotton Petroleum*, *supra*, or to conclude that the Fort Peck Reservation does not lie within Montana.

CONCLUSION

No principle of federalism is more deeply engrained in our law than the rule that state courts are obligated to follow and faithfully apply the decisions of this Court as to matters of federal law. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law.") Because the Montana Supreme Court failed to do so below, this Court should grant a writ of certiorari and reverse the decision of the Montana court.

Respectfully submitted,

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September 2002

APPENDIX

No. 00-358

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2002 MT 140

FLAT CENTER FARMS, INC.,

Petitioner and Respondent,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent and Appellant.

(Filed Jun. 21, 2002)

APPEAL FROM: District Court of the Fifteenth Judicial District, In and for the County of Roosevelt, The Honorable David Cybulski, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Chris Tweeten (argued), Assistant Attorney General, Helena, Montana
Roberta Cross Guns, Special Assistant Attorney General, Helena, Montana
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For Respondent:

Laura Christoffersen (argued), Christoffersen & Knierim, P.C., Culbertson, Montana

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For Amicus Curiae:

Maylinn Smith, Attorney at Law, University of Montana School of Law, Missoula, Montana (for The Assiniboine and Sioux Tribes)

Argued: June 5, 2001
Submitted: June 5, 2001
Decided: June 21, 2002

Filed: Ed Smith
Clerk

Justice Terry N. Trieweiler delivered the Opinion of the Court.

¶1 The Petitioner, Flat Center Farms, Inc., appealed the Respondent Department of Revenue's imposition of the Corporation License Tax to the State Tax Appeal Board. The State Tax Appeal Board upheld the Department of Revenue's assessment. Flat Center appealed to the District Court for the Fifteenth Judicial District in Roosevelt County. The District Court reversed the decision of the State Tax Appeal Board and held that the Corporation License Tax did not apply to Flat Center. The Department of Revenue now appeals from the order of the District Court. We affirm the order of the District Court.

¶2 The sole issue presented on appeal is whether the District Court erred when it concluded that the Montana Corporation License Tax may not be imposed on an Indian-owned corporation which does business entirely

within the exterior boundaries of the Fort Peck Reservation.

FACTUAL BACKGROUND

¶3 The relevant facts to this dispute were agreed upon by the parties. Flat Center Farms, Inc. was incorporated pursuant to the laws of Montana on December 3, 1993, and chartered by the Fort Peck Tribes as a Tribal Corporation on October 7, 1996. Flat Center's sole business activity is farming and the farming operation is located entirely within the exterior boundaries of the Fort Peck Reservation.

¶4 Kim Murray is an enrolled member of the Fort Peck Tribes. He and his wife, Denise Murray, each own 200 shares of Flat Center stock. There is no non-Indian ownership of the corporation. Denise Murray is an enrolled member of the Turtle Mountain Chippewa, a tribe that has allotted lands within the Fort Peck Reservation and whose members receive social services offered by the Fort Peck Reservation.

¶5 Flat Center leases all the land it farms. Some of this land is owned in fee simple by individual Indians; the remainder is held in trust by the federal government for Mr. Murray, the Tribes, or individual Indians. All of the leased lands are within the Fort Peck Reservation boundaries.

¶6 On July 12, 1996, the Department of Revenue assessed Flat Center for taxes owed pursuant to the corporation license tax for the tax year ending October 31, 1994. The corporation license tax provides that every corporation engaged in business in the State of Montana pay an

annual license fee "for the privilege of carrying on business in this state." § 15-31-101(3), MCA. The tax is assessed based on a percentage a corporation's total net income during the tax year. Flat Center appealed imposition of the tax to the Division Administrator on August 8, 1996. After the Director of the Department of Revenue upheld the Division Administrator's assessment of the corporation license tax, Flat Center petitioned to the State Tax Appeal Board (STAB). STAB also upheld the Department's assessment.

¶7 Flat Center appealed STAB's decision to the District Court for the Fifteenth Judicial District in Roosevelt County. The District Court reversed STAB and the Department and granted Flat Center's motion for summary judgment. The District Court held that 1) the beneficiaries of the income were ultimately Indian persons; 2) the situs of the activity generating the income was wholly within the reservation; and 3) the assets generating the income were Indian trust lands. The District Court further held that the corporate license tax impermissibly taxed lands held in trust for the Tribes and individual Indians. The Department now appeals from the order of the District Court.

STANDARD OF REVIEW

¶8 Our standard of review of appeals from summary judgment is *de novo. Motarie v. Northern Montana Joint Refuse Disposal Dist.* (1995), 274 Mont. 239, 242, 907 P.2d 154, 156. We apply the same criteria which is applied by the district court pursuant to Rule 56(c), M.R.Civ.P. *Spinler v. Allen,* 1999 MT 160, ¶ 14, 295 Mont. 139, ¶ 14, 983 P.2d 348, ¶ 14. The moving party must establish both

the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Hadford v. Credit Bureau of Havre, Inc.*, 1998 MT 179, ¶ 14, 289 Mont. 529, ¶ 14, 962 P.2d 1198, ¶ 14. Once the moving party has met its burden, the opposing party must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact. *Hadford*, ¶ 14.

DISCUSSION

¶9 Did the District Court err when it concluded that the corporation license tax may not be imposed on an Indian-owned corporation which does business entirely within the Fort Peck Reservation?

¶10 The heart of the State's argument is that there is a distinction between individual Indians and corporations. The State contends that because corporations are created by state law, they are not the legal equivalent of a tribal member and therefore Flat Center is not an "Indian" for purposes of Montana's tax code. Consequently, the income against which the license tax is assessed is not the individual income of an Indian, but rather corporate income subject to Montana's state tax laws like any other corporation doing business in Montana.

¶11 The longstanding rule is that a state is without power to tax reservation lands and Indian income generated from on-reservation activities absent the express authorization of Congress. *Mescalero Apache Tribe v. Jones* (1973), 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114. While the State concedes that it lacks the authority to tax the on-reservation activities of enrolled tribal members or to directly tax reservation lands, it contends that its

authority to tax non-Indians on the reservation should be presumed. According to the State, unless Flat Center falls under an exemption to that presumptive authority, the corporate license tax should apply.

¶12 However, the State's position reverses the presumption established by federal Indian law. Indian tribes have long been recognized as distinct, independent political communities qualified to exercise powers of self-government by virtue of their original tribal sovereignty. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 232 (1986). Chief Justice John Marshall wrote that Indian tribes are "domestic dependent nations" whose relationship with the federal government resembles that of a ward to a guardian. *Cherokee Nation v. Georgia* (1831), 30 U.S. (5 Pet.) 1, 17. As a consequence of this special relationship between co-equal sovereigns, tribal powers of self-government are limited only by federal statutes, the terms of treaties with the federal government, and by restraints implicit in the nature of the relationship itself – in all other respects the tribes remain independent and self-governing communities. COHEN'S HANDBOOK, at 235.

¶13 The exercise of state jurisdiction over activities occurring entirely on Indian lands is an infringement on inherent tribal authority and is contrary to principles of self-government and tribal sovereignty. *Williams v. Lee* (1959), 358 U.S. 217, 220-23, 79 S.Ct. 269, 271-72, 3 L.Ed.2d 251. In the area of state taxation, where "Chief Justice Marshall's observation that 'the power to tax involves the power to destroy' has counseled a more categorical approach," the exercise of state jurisdiction is even more circumscribed. *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation* (1992), 502 U.S. 251, 258, 112 S.Ct. 683, 688, 116 L.Ed.2d 687.

¶14 That is not to say that state taxation is precluded in every instance. There is ample federal authority to the contrary. *See, e.g., Washington v. Confederated Tribes of Colville Reservation* (1980), 447 U.S. 134, 156, 100 S. Ct. 2069, 2083, 65 L.Ed.2d 10; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* (1976), 425 U.S. 463, 483, 96 S.Ct. 1634, 1646, 48 L.Ed.2d 96. The point here is that the State should not be presumed to wield the sword of on-reservation tax authority absent an express Congressional provision. While we have not previously addressed the precise issue in this case, this Court has repeatedly recognized the need to promote tribal self-determination by deferring to tribal authority on matters of essential importance to tribes and their members. *See, e.g., In re Marriage of Skillen,* 1998 MT 43, ¶ 41, 287 Mont. 399, ¶ 41, 956 P.2d 1, ¶ 41 (recognizing tribal sovereignty and the right of self-government include authority to control the internal relations of tribal members); *Balyeat Law, P.C. v. Pettit,* 1998 MT 252, ¶ 36, 291 Mont. 196, ¶ 36, 967 P.2d 398, ¶ 36 (holding that Montana courts lack subject matter jurisdiction over debt collection action brought by non-Indian creditor whose rights arose on reservation); *In re Adoption of Riffle* (1995), 273 Mont. 237, 242, 902 P.2d 542, 545 (holding that the tribe is the ultimate authority on eligibility for tribal membership). Furthermore, we have considered whether tribal membership is critical to a determination of whether the State can tax income earned by Indians on tribal land. *See LaRoque v. State* (1978), 178 Mont. 315, 583 P.2d 1059 (holding that tribal membership was not determinative).

¶15 With these principles in mind, and based on the parties' stipulated facts, we conclude that Flat Center is not subject to the corporate license tax because Flat

Center is a tribally chartered corporation owned and operated by Indians, conducts business entirely on the Fort Peck Reservation, and does not "carry on business in this state."

¶16 The State contends that, as a nonmember with a corporate identity distinct from its stockholders, Flat Center does not enjoy the exemptions – the tax shield – from state taxation available to tribes and tribal members. An antecedent question, however, is whether there is statutory authority for taxing Flat Center's activities on the reservation in the first place. Based on the plain language of the corporate license tax, we conclude that there is not. The corporate license tax is an annual fee assessed "for the privilege of carrying on business in this state." Section 15-31-101(3), MCA. Flat Center does not carry on business in Montana. As the stipulated facts indicate, Flat Center does all its business in Indian country. Flat Center's activities occur solely on Indian land owned in fee or held in trust. All of those lands are within the exterior boundaries of the Fort Peck Reservation. In reality, the value the State wishes to tax is generated entirely in a sovereign state. Therefore, Flat Center's income is not earned in Montana.

¶17 The State relies heavily on *Baraga Products, Inc. v. Commissioner of Revenue* (W.D. Mich. 1997), 971 F. Supp. 294, *aff'd* (6th Cir. 1998), 156 F.3d 1228, a case which it contends is directly on point. In *Baraga Products,* the court opined that "because a corporation is a legal fiction owing its existence to state law, [plaintiff] is . . . not the legal equivalent of a member of the Tribe." *Baraga Products,* 971 F. Supp. at 296.

¶18 However, the published opinion in *Baraga Products* leaves important questions unanswered – the precise language of the Michigan business tax and, contrary to the suggestion in the dissenting opinion, whether significant commercial activity took place outside the Reservation. Furthermore, we have previously held that tribal membership is not essential to a determination of whether income earned on the Reservation is taxable. *See LaRoque,* 178 Mont. at 324, 583 P.2d at 1064.

¶19 In fact, we have in the past given greater weight to the situs of taxable income than the status of the income earner. That was the point of our holding in *LaRoque.* In *LaRoque,* this Court recognized the general rule that individual income earned by an Indian person and derived wholly from reservation sources is exempt from state income tax. *See McClanahan v. State Tax Comm'n of Arizona* (1973), 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129. We then went a step further and held that the income earned on the reservation by non-member Indians is exempt from state taxation. We reasoned that state jurisdiction was limited in "areas set aside by treaty for the exclusive use and control of Indians." *LaRoque,* 178 Mont. at 323, 583 P.2d at 1063. Our determination of whether income could be subjected to state taxation included an analysis of the situs of the activity as well as the status of the Indian as a member or non-member of the tribe. *LaRoque,* 178 Mont. at 324-25, 583 P.2d at 1064. We held:

> We therefore, conclude that *situs* of the activity is the primary factor in determining whether state taxation jurisdiction exists, not the status of the individual as enrolled or non-enrolled. We read the phrase "reservation Indian" in *McClanahan*

> to mean Indians residing on the reservation, and not just Indians who are enrolled members of the tribe. We find support for this conclusion in *Fox v. Bureau of Revenue* (1975), 87 N.M. 261, 531 P.2d 1234, cert. den. 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341. In *Fox,* the Court held a Comanche Indian who worked and resided on the Navajo reservation in New Mexico and who was not an enrolled member of the Navajo tribe, was nevertheless exempt from state income taxation. *Fox,* 531 P.2d at 1235. The Court indicated the important factors were the coalescence of situs (reservation) and status (Indian). *Fox* at 1234. The Court could find no cases where the status of the Indian in question as an enrolled tribal member was crucial; in fact, in the cases decided, tribal affiliation was unimportant as situs on a reservation and status as an Indian coalesced.

¶20 The State suggests that subsequent Supreme Court decisions have undercut the logic of *LaRoque* and that non-member Indians are the equivalent of non-Indians for purposes of state taxation. We disagree with this interpretation because we find the cases cited by the State to be materially different from the facts and issue now before us and conclude that the tribal status of the individual or corporation to be taxed may be relevant, but it is by no means dispositive. However, and most importantly, the statutory language pursuant to which the State asserts taxing authority limits that authority based on the situs of the activity from which income is earned. Flat Center, whether it is technically a tribal "member" or not, conducts all its commercial activity and generates all the value that the State now targets for taxation on the Fort Peck Reservation.

¶21 Moreover, analysis based on the totality of the circumstances as done in *LaRoque* would lead to the same result. Both stockholders of Flat Center are enrolled members of tribes served by the Fort Peck Reservation. Kim Murray is an enrolled member of the Fort Peck Tribes. His wife Denise is an enrolled member of the Turtle Mountain Chippewa, a tribe that has allotted lands within the Fort Peck Reservation and whose members receive social services, such as Indian Health Services, offered by the Fort Peck Tribes to enrolled members. The land from which the corporation derives its income is either owned by Indians or held in trust for Indians. Finally, although subsequent to the tax years in question, the Tribes have recognized Flat Center as a tribally chartered corporation. These factors in combination illustrate the strong nexus between Flat Center's activities and the interest of the Tribes in regulating and promoting commercial activity on its Reservation. Put another way, "the coalescence of situs (reservation) and status (Indian)" which guides traditional analysis is present. *See LaRoque,* 178 Mont. at 324, 583 P.2d at 1064.

¶22 For these reasons, the District Court was correct when it concluded that the Montana Corporation License Tax may not be imposed on a tribally chartered corporation which does business entirely within the Fort Peck Reservation. Accordingly, the order of the District Court is affirmed.

/s/ Terry Trieweiler
Justice

We Concur:

_____
Chief Justice

/s/ James Nelson

/s/ Jim Regnier

/s/ W. William Leaphart

/s/ Patricia Cotter

/s/ _____
Justices

Justice James C. Nelson specially concurs.

¶23 I concur in our opinion but write separately to submit an additional basis for our conclusion that Montana cannot impose its corporate license tax on Flat Center as a state-chartered corporation.

¶24 In a recent United States Supreme Court case, *Atkinson Trading Co. v. Shirley* (2001), 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889, the Court faced the question of whether the general rule established in *Montana v. United States* (1981), 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 – that, with limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation – applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land. The Court, in a unanimous opinion, held that the *Montana* rule did apply and that none of its

exceptions obtained. *Atkinson,* 532 U.S. at 647, 121 S.Ct. at 1828-29.

¶25 In the case at bar, we are faced with the converse fact situation – the State attempting to tax business activity of Indians involving non-fee lands and located entirely within the exterior boundaries of the reservation. Nevertheless, the U.S. Supreme Court's analysis in *Atkinson* applies, by analogy.

¶26 The tax at issue in *Atkinson* was an eight percent occupancy tax upon any hotel room located within the exterior boundaries of the Navajo Nation Reservation. While the incidence of the tax fell directly upon the guests – for the most part, tourists going and coming from Grand Canyon National Park – nonetheless, it was incumbent upon the owner or operator of the hotel to collect and remit the tax to tribal authorities. *Atkinson,* 532 U.S. at 648, 121 S.Ct. at 1829. Atkinson Trading Company, Inc., (Atkinson) the hotel owner, is a corporation owned by non-Indians with its business conducted, and its hotel located upon, non-Indian fee land within the exterior boundaries of the Navajo Reservation. *Atkinson,* 532 U.S. at 648, 121 S.Ct. at 1829.

¶27 Reaffirming the "controlling" principles announced in *Montana*[1] and in *Strate v. A-1 Contractors* (1997), 520

[1] "Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty . . . . Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed. . . . [T]he inherent sovereignty of Indian tribes was limited to 'their members and their territory': '[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent

(Continued on following page)

U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661, the Court applied *Montana* "straight up" to conclude that tribal taxation of non-Indians fell within *Montana's* general rule that "Indian tribes lack civil authority over . . . nonmembers on non-Indian fee land." Having, made that determination, the Court then placed the burden on the Navajo Nation (the Tribe) to establish the existence of one of the two *Montana* exceptions. *Atkinson,* 532 U.S. at 654, 121 S.Ct. at 1832.

¶28 To meet its burden the Tribe argued that the first *Montana* exception justified the imposition of its hotel occupancy tax. Specifically, the Tribe maintained that Atkinson and its guests had entered into a consensual relationship with the Navajo Nation and were the beneficiaries of numerous services – police protection, emergency medical care, fire protection – provided by the Tribe. *Atkinson,* 532 U.S. at 654-55, 121 S.Ct. at 1832-33.

¶29 Importantly for our purposes here, the Supreme Court rejected this argument. While not questioning the

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with the dependent status of tribes [which is] necessarily inconsistent with their freedom to determine their external relations.' '[T]he general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' [These principles, however, are subject to two exceptions:] First, '[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.' . . . Second, '[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Atkinson,* 532 U.S. at 649-51, 121 S.Ct. at 1830-31 (internal citations omitted).

Tribe's ability to charge an appropriate fee for a particular service actually rendered, the Court went on to state, "we think the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land . . . [and that] a nonmember's actual or potential receipt of tribal police, fire and medical services does not create the requisite connection." *Atkinson,* 532 U.S. at 655, 121 S.Ct. at 1833.

¶30 In so holding, the *Atkinson* Court narrowed the "consensual relationship" exception of *Montana* by eliminating the providing of incidental or generalized benefits as the sole basis for the tribal sovereign's imposition of taxing authority on those non-Indians who would not otherwise be subject to the tribe's taxing powers.

¶31 This reasoning applies by analogy to the instant case. The Department of Revenue argues that "the State asserts its power to collect the corporation license tax from Flat Center because it [Flat Center] has chosen to avail itself of the advantages of incorporating under the laws of Montana." The Department of Revenue maintains that this fact is "controlling" because when Flat Center incorporated under Montana law, "it obtained certain benefits and agreed to commensurate responsibilities." In the context of the instant case, *Atkinson* begs the question: "What benefits?"

¶32 The Department of Revenue contends that the benefits of incorporating include "estate planning, limitations on personal liability, employee benefits and certain tax benefits." No doubt these are benefits of incorporating. But, importantly, these are generalized benefits of the corporate form of business organization. Virtually every corporation and virtually all corporate shareholders in the

United States enjoy these sorts of benefits; these are not benefits peculiar to Montana corporations – even though they may be found in Montana law.

¶33 Under the rationale of *Atkinson,* and by analogy, the fact that Montana business corporations enjoy these sorts of "generalized benefits" no more supports the State's authority to tax a 100% Indian-owned Montana corporation doing business on non-fee property and solely within the reservation than does the provision of generalized benefits by tribal governments sustain the tribe's authority to tax nonmembers doing business on non-Indian fee property within the reservation.

¶34 If the State's hook to tax Flat Center on the reservation is the benefits it enjoys as a Montana corporation – and that seems to be the gravamen of the Department of Revenue's argument – then I submit that the hook is not strong enough to hold the fish. Under *Atkinson* providing generalized governmental benefits to the putative taxpayer is not sufficient to sustain, on a stand-alone basis, the sovereign's taxing authority under circumstances where the sovereign would not otherwise enjoy the power to tax.

¶35 If a tribal sovereign may not tax a state corporation owned by non-Indians doing business on fee land within the reservation, I cannot by analogy see how the State can claim any greater authority to tax a state corporation owned 100% by Indians doing business on non-fee land entirely within the reservation.

¶36 While the State might impose a fee or tax incident to the act of incorporating or incident to corporate operations and business conducted off the reservation, in my view, under the facts here, and given the Supreme Court's

rationale in *Atkinson,* the State lost its ability to impose its annual license tax on Flat Center.

¶37 I concur.

/s/ James Nelson
Justice

Justice W. William Leaphart concurs in the foregoing special concurrence.

/s/ W. William Leaphart
Justice

Justice Jim Rice dissenting.

¶38 I respectfully dissent.

¶39 It should be clarified, as the Court notes briefly, that for the only tax year in question, Flat Center was incorporated only as a Montana corporation, as the Tribe had not yet acted in regard to the entity. Thus, Flat Center was solely a creation of the State of Montana. Although emphasized by the parties, Flat Center's charter as a tribal corporation is not relevant to this Court's consideration, as it did not occur until several years after the 1993-1994 tax year in question.

¶40 The Court relies instead on the Indian status of the shareholders of Flat Center, describing Flat Center as an "Indian-owned" corporation. In so holding, the Court ignores the mountain of state and federal authority holding that corporations are separate entities which receive tax treatment without regard to the status of the shareholders, as clearly held in *Moline Properties v. Commissioner of Internal Revenue* (1943), 319 U.S. 436, 63

S.Ct. 1132, 87 L.Ed. 1499, and in *Baraga Products, Inc. v. Commissioner of Revenue* (W.D.Mich. 1997), 971 F. Supp. 294.

¶41 In *Baraga,* a non-Indian corporation owned by a tribal member and operating completely within the L'Anse Federal Indian Reservation brought action against the State of Michigan, seeking to permanently enjoin the state's levy of a business tax against it. Regarding the status of the subject corporation, the Court stated:

> Plaintiff's counsel conceded at oral argument that as a corporation, plaintiff is not actually an enrolled member of the Tribe . . . . Neither can plaintiff argue that it should be considered an enrolled member simply because its sole shareholder is a member of the Tribe . . . . A corporation cannot take on the form of its shareholder in order to reduce tax liability.

Baraga, 971 F.Supp. at 296 (citing *Moline*).

¶42 Further, in *Oklahoma Tax Commission v. Chickasaw Nation* (1995), 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400, the Supreme Court held that taxing the plaintiff there, a corporation, is not the same thing as taxing the shareholder, a tribal member. The Court reasoned that the proper inquiry was who bore the legal incidence, as opposed to the economic reality, of the tax. Here, it is clear that the legal incidence of the tax falls upon Montana corporation Flat Center, not the shareholders, even though they may ultimately suffer the economic consequence of the tax.

¶43 Under these holdings, the Indian status of Flat Center's shareholders does not determine the outcome of the corporate taxation issue before us. Further, these

holdings establish that the Court is impermissibly redefining the character of Flat Center from a Montana corporation to an entity of Indian personage, in order to void the assessment of the Montana corporation tax.

¶44 The Court next turns to a situs analysis to support its conclusion, citing the language in *LaRoque*. The Court unpersuasively turns away the State's argument that the *LaRoque* holding has been virtually eradicated by subsequent decisions of the United States Supreme Court, finding those cases to be somehow "materially different." Instead of circumspectly considering this development in the law, the Court chooses to illogically extend its situs analysis, finding that because all of the economic activity occurred within the reservation, "Flat Center does not carry on business in the State of Montana," and "Flat Center's income is not earned in Montana." Therefore, the Court concludes, Flat Center is not required to pay "for the privilege of carrying on business in this state," despite the mandate of § 15-13-101(3), MCA. I respectfully suggest that it may come as a surprise to many that the Fort Peck Reservation is no longer within the State of Montana, even for tax purposes.

¶45 It was stipulated that Flat Center was voluntarily incorporated as a domestic Montana corporation by its principals, who also elected that the corporation be a "C," or tax-paying, entity, and who have continued to maintain that entity. Despite this elective incorporation by the principals under the laws of the State of Montana, the Court reaches the nonsensical conclusion that Flat Center is within Montana for purposes of *forming* a domestic Montana corporation, but that it is not within Montana for purposes of *paying* the corporate tax assessed against such domestic corporations. "When the [tribal] taxpayer chooses

the advantages of incorporation, it must also accept the disadvantages with regard to taxation." *Baraga,* 971 F.Supp. at 296 (quoting *Moline*).

¶46 The Court has ignored the authority which should control the outcome of this case. While the Court correctly states that, absent express federal authorization, reservation lands and Indian income from reservation activities are exempt from state taxation, such is not true, however, for income of non-Indians derived from the reservation. In *Cotton Petroleum Corp. v. New Mexico* (1989), 490 U.S. — 163, 109 S.Ct. 1698, 104 L.Ed.2d 209, the Supreme Court held that where a state has not removed itself from providing government services benefitting the taxpayer and reservation residents generally, an otherwise nondiscriminatory tax on a nonmember – a corporation in that case – will be upheld unless Congress has specifically preempted the tax. There was no allegation here that the State of Montana has withdrawn public services or that Congress has specifically preempted the corporate tax in question. Consequently, I disagree with the Court's adoption of policy, stated in ¶ 14, that the State "should not be presumed to wield . . . on-reservation tax authority absent an express Congressional provision." While such a policy may indeed be preferable, the United States Supreme Court has clearly stated that such Congressional action is not a prerequisite for taxation of non-Indian corporations deriving income from the reservation.

¶47 Contrary to the Court, I find *Baraga* persuasive, and for more than its corporate analysis, discussed above. In validating the assessment of Michigan's corporate tax against an Indian-owned corporation operating on the reservation, the *Baraga* Court also analyzed under what

conditions a corporation might be immune from state taxation:

> It is possible that a corporation owned by Indian shareholders might be immune from state taxation if it is acting as an equivalent to the Indian tribe itself. For example, a corporation has been held to be entitled to the same sovereign immunity as the Indian tribe when it is organized under tribal laws; it is controlled by the Tribe; and it is operated for government purposes. See *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 379 (Minn. App. 1996); *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1109-11 (Ariz. 1989). Moreover, a corporation may be entitled to the protections of an Indian Tribe if it is acting as the tribe's agent. See *Enterprise Mgmt. Consultants, Inc. v. State ex rel. Oklahoma Tax Comm'n*, 768 P.2d 359 (Ok. 1988). But none of these conditions are present here and plaintiff concedes it is not acting as the Tribe's agent nor is it incorporated under the laws of the Tribe.

Baraga, 971 F. Supp. at 296-97.

¶48 Pursuant to this authority, and finding none of the conditions that may establish immunity from taxation here, I would find that the Montana corporate tax is validly assessed under federal law, that Flat Center is a Montana corporation which is distinct from its shareholders, and that it is subject to the tax.

¶49 The concurrence argues that under the rationale offered in *Atkinson*, the State has lost its ability to impose the corporate tax on Flat Center. *Atkinson* addressed tribal jurisdiction. State taxation jurisdiction, being a completely different animal, was not addressed in *Atkinson*, and that case offers no instruction, by analogy or

otherwise, to the issue here. The concurrence is an attractive policy argument for reciprocity between sovereigns, but is not an application of the federal law which is dispositive here.

¶50 I would reverse.

/s/ Jim Rice
Justice

Chief Justice Karla M. Gray, concurring.

¶51 I concur in the result reached by the Court, but not in the entirety of its analysis. Specifically, I do not agree with that portion of the Court's approach which appears to simply ignore the fact that a corporation has a legal identity separate from that of its owners, and which treats Flat Center as though it were a sole proprietorship owned by an individual Indian, operating within the confines of the reservation, with the owner directly receiving the income from the business endeavor. My agreement with the Court's result is based on a different, and much narrower approach to the present case.

¶52 I agree that situs is of great importance. But situs is not the sole factor, even under *LaRoque,* where we emphasized the necessity that situs on a reservation and status as an Indian (an individual Indian, in that case) must coalesce. As a result, I agree with much of the dissent's analysis of the importance of recognizing both the factual differences between a corporate identity and an individual, and the legal consequences which ordinarily would flow from those differences. Were it not for an odd anomaly in this case, I would join the dissent.

¶53 Instead, however, I concur in the result reached by the Court because the State stipulated in the District Court to the fact that Flat Center is a tribally chartered corporation. While the stipulation included the additional fact that Flat Center did not become a tribally chartered corporation until after the tax year at issue in this case, the State did not argue in the District Court that, at the relevant times, Flat Center's only corporate existence was pursuant to state law rather than tribal law. Had the State done so, I would have joined the dissent. On this record, however, it is my view that the State is bound by its stipulation, and I would not – and do not – consider any of its legal arguments that essentially attempt to change its position by "undoing" the stipulated fact which provides Flat Center with Indian status.

¶54 I concur in the result reached by the Court.

/s/ Karla M. Gray
Chief Justice

MONTANA FIFTEENTH JUDICIAL DISTRICT
COURT, ROOSEVELT COUNTY

FLAT CENTER FARMS, INC., Petitioner, -vs- STATE OF MONTANA, DEPARTMENT OF REVENUE, Respondent.	Cause DV-99-59 ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT (Filed Mar. 30, 2000)

This matter came regularly before the court on the 21st day of March, 2000 for oral argument upon the cross motions for summary judgment filed herein. Petitioner was represented by Laura Christoffersen, Esq. Respondent was represented by Roberta Cross Guns, Esq. The court having heard arguments, reviewed the factual record herein and the briefs of the parties, finds and orders as follows:

FACTUAL RECORD

The facts of this case are stipulated. See Stipulated Facts date May 28, 1999. Flat Center Farms, Inc. is a corporation incorporated under the laws of the State of Montana, incorporated on December 3, 1993. Flat Center Farms, Inc. is also a tribally chartered corporation which was chartered by the Fort Peck Tribes as a Tribal corporation on October 7, 1996.

Kim and Denise Murray, shareholders in Flat Center arms, Inc. are both enrolled members of Indian tribes. he farming operation of Flat Center Farms is located holly within in the exterior boundaries of the Fort Peck ndian Reservation. The lands farmed by Flat Center arms are all lands held in trust for individual Indians, ne Tribes or Kim Murray or in the alternative are deeded nds owned by Indian persons.

These very same lands were previously farmed by im Murray individually and when farmed by him indi-idually, the income therefrom was exempt.

OPINION

The State argues that the corporate entity is not ndian and therefore cannot claim the tax exemption. Flat enter Farms' argues that the Courts have found that the mportant factors were the coalescence of situs (reserva-on) and status (Indian)' citing *LaRogue v. State of Mon-ana*, 178 Mont. 315, 583 P.2d 1059, 1064 (1978).

The Montana Supreme Court has been liberal in nding exemptions for income earned by Indians on the eservation. In fact the Montana Supreme Court has held nat the 'situs of the activity is the primary factor in etermining whether state taxation jurisdiction exists, not ne status of the individual as enrolled or non-enrolled.' *aRogue*, 583 P.2d at 1063.

This court finds that the issue of taxation must be iewed from a review of the entire record and not just an olated fact such as the corporate status of the tax payer r the location of the activity. The record as a whole ndicates 1) the beneficiaries of the income whether

corporate or personal are ultimately Indian persons, 2) the situs of the activity generating the income is wholly within the reservation, and 3) the assets generating the income are Indian trust lands.

The tax imposed by the State, directly or indirectly constitutes a tax upon real property held in trust by the United States for an Indian tribe or person contrary to the provisions of M.C.A. § 2-1-304.

The situs prong of the test is clearly met. The Montana Supreme Court has held that the situs prong is the most important. With regard to whether the corporation holds status as an Indian to trigger tax exemption, the court finds that this argument is mere form over substance. The beneficiaries are Indian, the corporation is recognized as a tribal corporation, was formed in the only manner possible under the tribal code, and operates wholly within the reservation and on Indian owned lands.

For the foregoing reasons, the court finds that the decision of the State Tax Appeal Board should be reversed and grants summary judgment in favor of the Petitioner.

DATED this 28th day of March, 2000.

/s/ David Cybulski
David Cybulski
District Judge

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon parties or attorneys of record at their address or addresses this 30th day of March 2000

/s/ PS
PATRICIA A. STENNES
Clerk of Court
Wolf Point, MT 59201

/s/ Christoffersen
Cross Guns

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

FLAT CENTER FARMS, INC., Appellant, -vs- THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	DOCKET NO: CT-1998-3 FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND OPPORTUNITY FOR JUDICIAL REVIEW

The above-entitled appeal was set for hearing on May 5, 1999 in Glasgow, Montana. At the request of counsel for both parties, a telephonic pre-hearing conference was held on April 29, 1999. Both parties agreed that no substantive issues of fact remained in this case and that the matter could be submitted on briefs detailing the legal arguments. Accordingly, the May 5 hearing was vacated and a briefing schedule was developed. Final briefs were due on July 15. Having received briefs in a timely fashion from both parties, and having reviewed the briefs, the taxpayer's initial complaint, the Department of Revenue's answer to the complaint, and the Final Agency Order of the Department of Revenue, and being well and fully informed in the premises, the Board finds and concludes as follows:

STATEMENT OF THE ISSUE

Flat Center Farms, Inc. (Flat Center) is a Montana corporation incorporated under the laws of Montana and

doing business within Montana. The corporation is wholly owned by enrolled Indian persons. The taxpayer contends that, because the shareholders of the corporation are individually exempt from Montana corporate license tax due to their status as enrolled members of an Indian tribe, the corporation should also be afforded this exemption.

FINDINGS OF FACT

The parties stipulated and agreed upon the following facts:

1. Flat Center Farms, Inc. is a corporation incorporated under the laws of the State of Montana, incorporated on December 3, 1993. Flat Center Farms, Inc. is a "C" corporation.

2. Flat Center Farms, Inc. is also a tribally chartered corporation which was chartered by the Fort Peck Tribes as a Tribal Corporation on October 7, 1996.

3. Kim Murray is an enrolled member of the Fort Peck Tribes, enrollment number U07523. His wife, Denise Murray, is an enrolled member of the Turtle Mountain Chippewa, which is also served by the Fort Peck Reservation. Denise Murray's enrollment number is 70-0175.

4. Kim Murray owns 200 shares of Flat Center Farms, Inc. and his wife, Denise Murray, owns 200 shares.

5. Flat Center Farm's sole business activity is farming.

6. Flat Center Farm's farming operation is located wholly within the exterior boundaries of the Fort Peck Reservation.

7. Flat Center Farm, Inc. rents real estate upon which it operates its farming operation. The land is owned as follows:

> 898.4 acres trust land, held in Trust for individual Indians or the Fort Peck Tribes;
>
> 419.5 acres deeded land, owned by various Indian persons, all of said lands being Located on the Fort Peck Indian Reservation;
>
> 481 acres owned by the United States Government in trust for Kim Murray.

8 These very same lands were previously farmed by Kim Murray individually. When farmed by Kim Murray individually, rather than through his Indian owned corporation, the income from said land was tax exempt.

TAXPAYER'S CONTENTIONS

Flat Center contends that since 1) the corporation is tribally chartered, 2) the corporate activity occurs solely on the Fort Peck Indian Reservation, 3) the sole owner is a tribal member, and 4) the sole beneficiaries of the income are Indian persons, the income should remain exempt from state income tax.

In its opening brief, Flat Center cites the authority for state income tax exemption of individual income earned by an Indian person derived solely from reservation sources as *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). This holding was adopted as the law of the state of Montana in 1978 by the Montana Supreme Court in *LaRoque v. State of Montana*, 315, 583 P.2d 1059 (1978). *LaRoque* also gave tax exempt status to non-enrolled

Indian persons whose income was earned solely from on-reservation activity.

Flat Center emphasized that, in *LaRoque*, the Montana Supreme Court found that the "primary factor in limiting state jurisdiction is whether the activity occurred in 'areas set aside by treaty for the exclusive use and control of Indians' ", Id. at 603. Thus, the *LaRoque* finding was that the physical site of the income-producing activity is the primary factor in determining exempt status.

Flat Center argued that the present case is analogous in that the status of the taxpayer, a corporation, is secondary to the fact that the income-producing activity took place wholly within the boundaries of an Indian reservation. As Indians earning income on the reservation, that income must be exempt from state taxation.

Further support for this conclusion was held in *State of Montana v. Bird*, 252 Mont. 438, 829 P.2d 941 (1992) in which the Montana Supreme Court held that even the income of an Indian residing on the reservation, but earned while working on non-Indian land off the reservation is exempt when the income is derived from tribally owned minerals under the land. Flat Center argued that this opinion also found the situs of the activity to be the primary factor in determining tax exemption.

In *Fatt v. Utah State Tax Commission*, 884 P.2d 123 (1994), the Utah Supreme Court held that an Indian serviceman's Navy pay was exempt from state income tax when his domicile remained his reservation home even though he was actually living elsewhere while he served in the military. Flat Center argued that, if another court extends the exemption to income earned off reservation and to work obviously not related to on-reservation work,

income earned from on-reservation work by a solely Indian owned and tribally chartered corporation should be exempt. The fact that the vast majority of the lands farmed by Flat Center are trust lands held by the United States government for Indian owners or the Fort Peck tribes lends further support for exemption, according to the taxpayer.

In summary, the taxpayer urged this Board to conclude that the income in dispute, which was exempt when Mr. Murray's farming operation was not incorporated, should remain exempt since the corporation was tribally chartered and solely owned by Indian persons. This income was earned entirely within the exterior boundaries of the Fort Peck Indian Reservation and the sole benefactors of the corporation are the Indian shareholders, Kim and Denise Murray. The situs of the activity and the Indian status of the entity have coalesced and therefore the income is exempt.

DEPARTMENT OF REVENUE'S CONTENTIONS:

The Department of Revenue (DOR) contended that the major flaw in the taxpayer's argument in favor of exemption is its failure to recognize the difference between individual income and corporate income. The DOR argues that, because corporations are separate entities, with an identity separate from its creators, they are taxed under a different statutory scheme than individuals.

Montana's corporation license tax or fee is paid "for the privilege of carrying on business in this state," and applies to all corporations subject to taxation (Section 15-31-101 (3), MCA). The corporation license tax is based

upon a percentage of a corporation's total net income for the preceding taxable year.

Section 15-31-101 (2), MCA, defines the terms "engaged in business" and "doing business" as both meaning "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."

The DOR concludes that Flat Center is subject to the corporation license tax pursuant to Title 15, chapter 31 of the Montana Code Annotated because it is organized as a Montana corporation for the purpose of financial or pecuniary gain; because its transactions all occur within Montana; and because Flat Center is not an individual.

In response to Flat Center's argument that, because it is owned solely by Indians who are enrolled members of a federally recognized tribe, the income is exempt from taxation by the state, the DOR contends that a corporation "is a legal fiction that has a life of its own, separate and distinct from its creator or creators and its shareholders", citing *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 636, 657, 4 L.Ed. 629) in Black's Law Dictionary 180 (5th ed. 1983) which defines a corporation as:

> [A]n artificial person or legal entity created by or under the authority of the laws of a state or nation . . . ordinarily consisting of an association of numerous individuals. Such entity . . . is regarded in law as having a personality and existence distinct from that of its several members . . .

The DOR cited case law (*Moline Properties v. Commissioner of Internal Revenue*, 319 U.S. 436 (1943) to support the argument that a corporation is separate and distinct from its creator, shareholders and directors. In *Moline*, the

United States Supreme Court held that a corporation was a separate entity from its sole shareholder and must be taxed accordingly, stating a corporation "fills a useful purpose in business life . . . [and] so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity."

The DOR further argues that Indian status cannot be obtained simply because the shareholders and incorporator are Indian; rather, that status is obtained by an individual as an enrolled member of a federally recognized tribe or by being a member of an Indian community wherein the individual is recognized as an Indian.

Flat Center, also makes the erroneous argument, that, because it is recognized by tribal charter, it should be exempt from taxation by the state. The DOR counters this argument by pointing out that the tribe does not own Flat Center and that Flat Center was not incorporated under Section 17 of the Indian Reorganization Act. Tribal charter has no effect; it is merely a recognition that the corporation exists. The tribal charter was enacted after the incorporation under state law took place and the tribal resolution is clear that the action was taken to avoid Montana tax, rather than to effect a tribal self-governance program. The tribal charter was not done in place of the Montana incorporation, thereby replacing a state corporation with a tribally-chartered corporation.

Corporate organization under the Indian Reorganization Act (IRA) makes the corporation an extension of the tribe and, thus, not taxable by the state. IRA provisions allow a tribe to form a corporation to promote economic self-sufficiency or to provide financial support for social

programs. The DOR asserts that Flat Center was formed for financial or pecuniary gain and not to promote tribal interests, thereby precluding the requisite connection to tribal interests to sustain exemption from state taxation.

The DOR included a copy of the Federal Internal Revenue Service Revenue Ruling 94-16 with its response brief. According to the DOR, this ruling that indicates Indian corporations organized under state law, as was Flat Center, are subject to federal taxation. Ms. Cross Guns writes: "The rationale supporting this ruling is that an organization created by state law is fundamentally different from one created under federal law, such as the IRA. 25 U.S.C. Section 477 (1993). According to the ruling, an Indian tribe maintains tax exempt status, and a tribal corporation formed under the IRA is also exempt. However, where a corporation is formed under state law, that organization, regardless of the Indian status of any of its members, is subject to federal taxation."

While Revenue Ruling 94-16 does not indicate whether a state may also tax a corporation which is comprised of Indian members and was formed under state law, the DOR argues that case law supports a state's authority to apply a nondiscriminatory tax to an Indian-owned corporation formed under state law. " . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business . . . " *Cotton Petroleum Corp v. New Mexico*, 490 U.S. 175 (1989). The DOR also cites *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949.) which served to establish and strengthen the Court's position that a state can impose a nondiscriminatory tax on private parties

with whom the United States or an Indian tribe does business.

The DOR also argues that the fact that Montana corporate income tax is tied to federal corporate income tax (Section 15-31-113, MCA), is further supportive of its claim that Indian-owned corporations formed under state law are subject to state corporation tax in light of Revenue Ruling 94-16 discussed above.

The DOR also discusses the fact that Flat Center leases or rents all of the land it uses to farm. Ms. Cross Guns writes, "The owners of the land, whether it is held in trust or as fee land, are compensated for Flat Center's use of the land. One of those owners is Kim Murray. Mr. Murray incorporated Flat Center Farms. The corporation pays Mr. Murray, by way of the federal government, for the corporation's use of that land. The lease money paid for use of the land, in fact, is income derived from the land. By leasing the land for its own uses, the corporation has created another legal fiction that acts as distance for the question of situs."

In summary, Ms. Cross Guns argues that Flat Center Farm's corporate income is subject to state taxation because " . . . a corporation is a legal fiction that creates an entity separate from its members, thus rendering the corporation incapable of obtaining Indian status. Without status as an individual Indian, the corporation's income is not exempt from taxation by the state. Furthermore, the issues of situs is rendered moot for two reasons: situs is only important where income is generated by an individual Indian, and situs is defeated where the landowner has contracted with a non-Indian entity for the use of that land."

DISCUSSION

The parties to this dispute appear to differ upon the importance of situs versus corporate status in the determination as to whether or not the assessment of Montana Corporation License Tax and interest for tax year ending October 31, 1994 was correct.

Flat Center argues that the situs (Indian trust land farmed by Kim Murray, shareholder in the corporation) is governing in the determination of exemption from Montana corporate license tax. Flat Center contends that this income was earned entirely within the exterior boundaries of the Fort Peck Indian Reservation and the sole benefactors of the corporation are the Indian shareholders, Kim and Denise Murray. The situs of the activity and the Indian status of the entity have coalesced and therefore the income is exempt.

The DOR argues that the corporate status of Flat Center renders it subject to the state corporate license tax due to its contention that a corporation is legally recognized as an entity which is separate and distinct from its creator, shareholders and directors. Further, the DOR contends that Indian status cannot be obtained simply because the shareholders and incorporator are Indian; rather, that status is obtained by an individual as an enrolled member of a federally recognized tribe or by being a member of an Indian community wherein the individual is recognized as an Indian.

Upon review of the relevant case law, statutory law and arguments presented by both parties to the appeal, the Board finds merit in the arguments of the DOR. A significant amount of case law was presented in support of the argument that a corporation is a separate legal entity

from its creators, owners or shareholders. Incorporation is a business decision which carries with it certain benefits to the incorporator, including some degree of protection from legal action against its shareholders, directors, etc., and some tax and financial advantages. Flat Center's argument in favor of tax exemption for the corporation because the individual, Kim Murray, received exemption due to his status as an enrolled Indian fails.

Further, it has not been demonstrated that Flat Center Farms, Inc. was created to promote tribal interests. The record indicates that the purpose of Flat Center is for profit or financial gain through farming income. Business entities conducting nontribal business are not exempt from state taxation and is subject to Montana Corporation License Tax under Section 15-31-101, Montana Code Annotated.

Flat Center's argument that it should be exempt from state taxation because it is recognized by a tribal charter fails. The record does not indicate that any of the tribes served by the Fort Peck Indian Reservation own Flat Center. Further, it appears that the tribal charter is simply a recognition that Flat Center exists.

Flat Center argued for exemption due to the fact that the majority of the lands it farms are within the exterior boundaries of the Fort Peck Indian Reservation. This land is also held in trust by the federal government for Indian owners of the Fort Peck tribes (situs argument). The Board finds that the argument in favor of exemption due to situs fails because Flat Center does not have status as an **individual** Indian and, thus, its income is not exempt from taxation by the state. Further, the record indicates that Flat Center has contracted with a non-Indian entity,

via trust and deeded land, for the use of the land it uses to farm.

CONCLUSIONS OF LAW

1. The subject income is subject to Montana Corporation License Tax under Section 15-31-101, MCA.

2. Flat Center Farms, Inc., a corporation, does not have status as an individual Indian, by virtue of its status as a separate legal entity, and its income is not exempt from taxation by the state.

3. The appeal of the taxpayer is hereby denied and the decision of the Montana Department of Revenue is hereby affirmed.

ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the taxes and interest assessed are properly due and owing.

DATED this 19th of July, 1999.

BY ORDER OF THE
STATE TAX APPEAL BOARD

/s/ Gregory A. Thornquist
GREGORY A. THORNQUIST,
(SEAL) Chairman

/s/ Jan Brown
JAN BROWN, Member

/s/ Jereann Nelson
JEREANN NELSON, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of July, 1999, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

Laura Christoffersen
Attorney at Law
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Tax Counsel
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/s/ Donna Eubank by Jan
DONNA EUBANK
Paralegal

Director's Office
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BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the Matter of:
Flat Center Farms,
Inc. ID# 81-0488763
AUDIT PERIOD Year ending October 31, 1994

FINAL AGENCY DECISION

On the 12th day of July, 1996, the Department of Revenue, through the Natural Resource and Corporation Tax Division, issued an audit assessment for Flat Center Farms, Inc., hereinafter referred to as "Taxpayer", regarding the assessment of additional Montana Corporation License Tax and interest for tax year ending October 31, 1994.

The Taxpayer submitted its letter of appeal with the Division Administrator on August 8, 1996. Reasons for the objection were submitted within the 60 days of the date the objection was mailed to the Department of Revenue, which was August 5, 1996.

In consideration of the timely appeal, I have reviewed the entire file and applicable documents provided regarding this action and find that the Division's assessment issued on July 12, 1996, is based upon competent substantial evidence, and the Division complied with the essential requirements of law when interpreting the relevant statutes and regulations to the facts of the matter.

Flat Center Farms, Inc. (Taxpayer) is a Montana corporation incorporated under the laws of Montana, and doing business within the State of Montana. The corporation is wholly owned by enrolled Indian persons.

Section 15-31-101, of the Montana Code Annotated provides, in pertinent part:

> **15-31-101. Organizations subject to tax**. (1) The term "corporation" includes associations, joint-stock companies, common-law trusts and business trusts which do business in an organized capacity, and all other corporations whether created, organized, or existing under and pursuant to the laws, agreements, or declarations of trust of any state, country, or the United States.
>
> (2) The terms "engaged in business" and "doing business" both mean actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.
>
> (3) Except as provided in 15-31-103 or 33-2-705(4) or as may be otherwise specifically provided, every corporation engaged in business in the state of Montana shall annually pay to the state treasurer as a license fee for the privilege of carrying on business in this state the percentage or percentages of its total net income for the preceding taxable year at the rate set forth in this chapter. . . .

Section 15-31-101, MCA (Emphasis added).

Taxpayer argues it is exempt from the above-referenced tax due to the fact that it is wholly owned by enrolled members of an Indian tribe. It argues that because the shareholders of the corporation are individually

exempt from Montana tax, that the corporation should also be afforded this exemption.

It is well recognized that a corporation has a separate and distinct identity from its stockholders. *Audit Services, Inc. v. Frontier-West, Inc.*, 252 Mont. 142, 148, 827 P.2d 1242, 1246 (1992). Additionally, Montana generally does not identify corporations with the nationality or ethnicity of their shareholders.

While the shareholders of this corporation are enrolled members of an Indian tribe and exempt from Montana income tax, the corporation is neither a Native American nor an enrolled member of any Indian tribe. Moreover, the corporation here is not engaged in a business for the benefit of an Indian tribe. Courts have recognized that while corporations conducting tribal business may be clothed with tribal immunity from state jurisdiction, business entities conducting nontribal business are not afforded the same protection. See *Dixon v. Picopa Construction Co.*, 772 P.2d 1104 (Ariz. 1989).

In this case, Flat Center Farms, Inc., is a corporation conducting nontribal business, regardless of the fact that it is wholly owned by enrolled tribal members and conducts business on an Indian reservation. It is, therefore, not immune from state jurisdiction and is subject to Montana Corporation License Tax under section 15-31-101 of the Montana Code Annotated.

IT IS ORDERED, that the Division assessment affirmed by the Bureau Chief in the above-referenced cause on July 12, 1996 is adopted as the Final Decision of the Department of Revenue.

Dated this 17th day of July, 1998.

MONTANA DEPARTMENT
OF REVENUE
P.O. Box 202701
Helena, Montana 59620-2701

/s/ Mary Bryson
MARY BRYSON
Director

NOTICE OF APPEAL RIGHTS

This decision is final to the Department of Revenue. The Taxpayer has a right to appeal this decision by filing an appeal with the State Tax Appeal Board within 30 days of the date this decision is mailed to the Taxpayer (the date of this final notice). If the Taxpayer does not file such an appeal within that time, it will lose all further right to contest this decision. The address of the State Tax Appeal Board is:

State Tax Appeal Board
1209 8th Avenue
Helena, MT 59620

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 20 day of July, 1998 a true and correct copy of the foregoing has been served by placing same in the United States Mail, postage prepaid, addressed as follows:

Laura Christoffersen
200 Highway 2 East
P. O. Box 997
Wolf Point, MT 59201

PERSONAL SERVICE ON:

Steve Austin, Audit Manager
Corporation Tax Bureau
Mitchell Building
Helena, Montana 59620

/s/ Cheryl P. Emmons

The following is an excerpt from Respondent's Brief before the Montana Supreme Court dated September 6, 2000:

ARGUMENT

I. INCOME EARNED BY INDIANS ON THE RESERVATION IS WHOLLY EXEMPT FROM STATE TAXES.

Indian tribes and individual Indians are generally exempt from state taxation within their own territory, unless Congress has authorized such taxation and has clearly manifested its intent to do so. ***Montana v. Blackfeet Tribe of Indians***, 471 U.S. 759 (1985). Absent a federal statute, there is no authority for state taxation of reservation lands or Indian income from activities occurring within the boundaries of the reservation. ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 (1973). (Excerpt – Respondent's Brief at 4.)

* * *

The following are excerpts from the Appellant's Brief before the Montana Supreme Court dated August 11, 2000:

STANDARD OF REVIEW

The issues here are limited to questions of federal law, and review is thus de novo. ***State v. Luchau*** (1999), 297 Mont. 415, 416, ¶8, 992 P.2d 840, 842, ¶8.

SUMMARY OF ARGUMENT

Federal Indian law gives the State the right to impose taxes on nonmembers doing business on reservation land. Since Flat Center is not an Indian, the State may legally impose taxes on such a statutorily created corporation.

In ***Baraga Products, Inc. v. Commissioner of Revenue***, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd.* 156 F.3d 1228 (6th Cir. 1998) (table), a case that is directly on point, the court indicated that "because a corporation is a legal fiction owing its existence to state law, [plaintiff] is . . . not the legal equivalent of a member of the Tribe." ***Baraga***, 971 F. Supp. at 296. (Excerpt – Appellant's Brief at 5.)

* * *

ARGUMENT

I. STATE TAXES APPLY TO NONMEMBERS RESIDING ON INDIAN RESERVATIONS.

The district court engaged in an ad hoc balancing of several factors it believed relevant to determining the applicability of the Corporation License Tax to Flat Center.

Aside from what may be inferred by its reference to ***LaRoque v. State*** (1978), 178 Mont. 315, 583 P.2d 1059, the court's brief opinion cited no authority for its unprecedented analysis. The issue is whether *Congress* has precluded application of the tax, and plainly it has not. The analysis by the court in ***Baraga*** is more persuasive. This case is directly on point as discussed below. (Excerpt – Appellant's Brief at 7.)

* * *

First, the "reservation Indians" referred to in ***Yakima*** and the "tribal members" referred to in ***Sac and Fox*** refer only to members of the tribe for which the involved Indian country has been set aside. This meaning was settled in ***Washington v. Confederated Tribes of Colville Indian Reservation***, 447 U.S. 134 (1980). There, the Supreme Court upheld the imposition of a state cigarette tax on reservation sales to nonmembers, including nonmember Indians, by tribal retailers. . . . (Excerpt – Appellant's Brief at 9.)

* * *

The second principle is that the legal, not the economic, incidence of the challenged tax controls determination of who or what entity is taxed. The Supreme Court reiterated this principle most recently in ***Oklahoma Tax Commission v. Chickasaw Nation***, 515 U.S. 450 (1995). The Court rejected the suggestion that the validity of a state motor fuels tax assessed against tribal retailers be measured "by weighing the relevant state and tribal interests." ***Chickasaw***, 515 U.S. at 457. (Excerpt – Appellant's Brief at 11.)

* * *

The third principle is that, in resolving whether Congress has pre-empted the authority of a state to impose a tax on a nonmember doing business within Indian country or, more particularly, on reservation land leased from a tribe, its members, or the United States in its trustee capacity, the Supreme Court has "applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved . . . 'requir[ing] a particularized examination of the relevant state, federal, and tribal interests.'" ***Cotton Petroleum Corp. v. New Mexico***, 490 U.S. 163, 176 (1989). (Excerpt – Appellant's Brief at 12.)

* * *

It is clear from ***Cotton Petroleum*** that, at least where a state has not removed itself completely from providing governmental services benefiting the taxpayer and reservation residents generally, an otherwise nondiscriminatory and not "unusually large" tax on a nonmember will be upheld unless the text of relevant federal legislation or other grounds reflect a congressional intent to prohibit it. ***Id.*** at 186.[1] (Excerpt – Appellant's Brief at 14.)

* * *

In ***Moline Properties v. Commissioner of Internal Revenue***, 319 U.S. 436 (1943), the Supreme Court held that a corporation, was a separate entity from its sole shareholder and must be taxed accordingly. In its discussion of the

---

[1] Even an unusually large tax is not subject to complete pre-emption under ***Cotton Petroleum***. It instead is pre-empted only to the extent determined "exorbitant." ***Montana v. Crow Tribe***, 523 U.S. 696, 715 (1998).

so-called "doctrine of corporate entity," the Court stated that a corporation:

> "fills a useful purpose in business life. . . . [and] so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity."

Moline Properties, 319 U.S. at 438-439. (Excerpt – Appellant's Brief at 16.)

* * *

Cotton Petroleum plainly establishes that, against such a regulatory backdrop, congressional preemption may not be implied. The state interest in enforcing its taxation statutes is significant both because the taxpayer here – Flat Center – owes its very existence to Montana law and because, more importantly, the revenue from the tax is used to provide governmental services that benefit the taxpayer and other state residents. The tribal interest is undefined in the current record but, in light of ***Thomas*** and subsequent decisions, is unquestionably insignificant. Any federal interest similarly has not been shown as inconsistent with the Corporation License Tax's imposition. (Excerpt – Appellant's Brief at 20.)

* * *

The following are excerpts from DOR's Brief in Support of Motion for Summary Judgment and in Response to Petitioner's Motion for Summary Judgment before the Montana Fifteenth Judicial District Court, Roosevelt County, dated February 14, 2000:

In the case presented here, it first appears that the question presented involves only an individual. But the question is really one of sovereignty and its relation to a corporation formed under state law. Does tribal sovereignty prevent state action with regard to an Indian-owned corporation doing business within the exterior boundaries of the reservation? (Excerpt – DOR's Brief in Support at 3.)

* * *

Finally, there is case law support for the proposition that corporations are separate and distinct from their creators, their stockholders and their directors. In ***Moline Properties v. Commissioner of Internal Revenue***, 319 U.S. 436 (1943), the United States Supreme Court (hereafter "Court") held that Petitioner (a corporation), was a separate entity from its sole shareholder and must be taxed accordingly. In its discussion of the so-called "doctrine of corporate entity," the Court stated that a corporation

> "fills a useful purpose in business life. . . . [and] so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity."

Id. at 438-439. The Corporation asserts that, due to its ownership, it should be viewed as having Indian status.

The legal status of being "Indian" has unique consequences and benefits where that status occurs within the exterior boundaries of an Indian reservation, including exemption from state income tax. However, because the identity given a corporation is separate from its members, that prevents it, in this case, from obtaining "Indian" status. Indian status is a particular term of art, referring to either being an enrolled member of a federally recognized Indian tribe, or being a member of an Indian community wherein the individual is recognized as an Indian. *See* ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973); ***LaRoque v. State of Montana*** (1978), 178 Mont. 315, 583 P.2d 1059. That status cannot be obtained or earned simply because the shareholders and incorporator are Indian. Failure of Flat Center Farms, Inc. to obtain status an as "Indian" prohibits the Corporation's argument that the racial makeup of its membership prevents the state of Montana from taxing the Corporation. (Excerpt – DOR's Brief in Support at 6-7.)

* * *

Since the Court's 1973 decision in ***Mescalero Apache***, various U.S. Supreme Court cases have broadened the understanding and application of state intervention within reservation boundaries, particularly in the area of taxation. *See, e.g.,* ***County of Yakima v. Confederated Tribes***, 502 U.S. 251 (1992); ***Lummi Indian Tribe v. Whatcom County, Washington***; 5 F.3d 1355 (9th Cir. 1993); ***Cass County, Minnesota, et al. v. Leech Lake Band of Chippewa Indians***, No. 97-174 (Decided June 8, 1998). Each of these recent decisions has looked at the interplay between the various tribes' interests in self-governance and the action sought by the various states. Where there is no direct linking of self-governance to the

issue before the Court, a state has been allowed to apply non-discriminatory taxes to both individual tribal members and tribes as a whole. (Excerpt – DOR's Brief in Support at 12.)

* * *

The following are excerpts from DOR's Response Brief before the Montana State Tax Appeal Board dated July 1, 1999:

Does tribal sovereignty prevent state action with regard to an Indian-owned corporation doing business within the exterior boundaries of the reservation? (Excerpt – DOR's Response Brief at 2.)

* * *

LAW AND ARGUMENT

1. Individual income is different from business corporation income under Montana law.

Flat Center Farms, Inc. (hereafter "Corporation"), asserts that the income derived by it is not taxable. This assertion is based on case law regarding the state's inability to tax individual income of Indians residing within the exterior boundaries of a reservation. *See* Appellant's Brief pp. 2-5 (citing ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973); ***LaRoque v. State of Montana***, 178 Mont. 315, 583 p.2d 1059 (1978); ***State of Montana v. Bird***, 252 Mont. 438, 829 P.2d 941 (1992); ***Fatt v. Utah State Tax Commission***, 884 P.2d 1233 (Utah 1994) (cites omitted)). However, the Corporation fails to recognize there is a distinct difference between individual income and corporate income. Because corporations are distinct entities, created for special purposes and affording special benefits, they are taxed under a distinctly different statutory design. (Excerpt – DOR's Response Brief at 3.)

* * *

A corporation is a legal fiction that has a life of its own, separate and distinct from its creator or creators and its stockholders. According to Black's Law Dictionary, Abridged Fifth Edition (citing ***Dartmouth College v. Woodward***, 17 U.S. (4 Wheat) 518, 636, 657, 4 L.Ed. 629), a corporation is defined in pertinent part as

> [A]n artificial person or legal entity created by or under the authority of the laws of a state or nation . . . ordinarily consisting of an association of numerous individuals. Such entity . . . is regarded in law as having a personality and existence distinct from that of its several members . . .
>
> Black's Law Dictionary 180 (5th ed. 1983).

(Excerpt – DOR's Response Brief at 4.)

* * *

Finally, there is case law support for the proposition that corporations are separate and distinct from their creators, their stockholders and their directors. In ***Moline Properties v. Commissioner of Internal Revenue***, 319 U.S. 436 (1943), the United States Supreme Court (hereafter "Court") held that Petitioner (a corporation), was a separate entity from its sole shareholder and must be taxed accordingly. In its discussion of the so-called "doctrine of corporate entity," the Court stated that a corporation "fills a useful purpose in business life. . . . [and] so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." ***Id.*** at 438-439.

The Corporation asserts that, due to its ownership, it should be viewed as having Indian status. The legal status of being "Indian" has unique consequences and benefits where that status occurs within the exterior boundaries of an Indian reservation, including exemption from state income tax. However, because the identity given a corporation is separate from its members, that prevents it, in this case, from obtaining "Indian" status. Indian status is a particular term of art, referring to either being an enrolled member of a federally recognized Indian tribe, or being a member of an Indian Community wherein the individual is recognized as an Indian. *See* ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973); ***LaRoque v. State of Montana***, 178 Mont. 315, 583 P.2d 1059 (1978). That status cannot be obtained or earned simply because the shareholders and incorporator are Indian. Failure of Flat Center Farms, Inc., to obtain status as an "Indian" prohibits the Corporation's argument that the racial makeup of its membership prevents the State of Montana from taxing the Corporation. (Excerpt – DOR's Response Brief at 5-6.)

* * *

According to the U.S. Supreme Court in ***Jones***, "even on reservations, state laws may be applied unless such application would interfere with reservation self-governance or would impair a right granted or reserved by federal law." ***Jones***, 411 U.S. at 148. In the present case, there is a clear absence of evidence that Flat Center Farms, Inc., is, in any way, a part of the Fort Peck Tribe's self-governance efforts, nor is there any evidence that incorporation was connected to, or performed because of, a right granted by federal law. In fact, incorporation was performed under state law. Thus, the Corporation's

argument that this Corporation's approval by the Fort Peck Tribal Business Council gives it exemption status fails. (Excerpt – DOR's Response Brief at 9.)

* * *

Since the Court's 1973 decision in ***Jones***, various U.S. Supreme Court cases have broadened the understanding and application of state intervention within reservation boundaries, particularly in the area of taxation. *See, e.g.*, ***County of Yakima v. Confederated Tribes***, 502 U.S. 251 (1992); ***Lummi Indian Tribe v. Whatcom County, Washington***, 5 F.3d 1355 (9th Cir. 1993); ***Cass County, Minnesota, et al. v. Leech Lake Band of Chippewa Indians***, No. 97-174 (Decided June 8, 1998). Each of these recent decisions has looked at the interplay between the various tribes' interests in self-governance and the action sought by the various states. Where there is no direct linking of self-governance to the issue before the Court, a state has been allowed to apply non-discriminatory taxes to both individual tribal members and tribes as a whole. (Excerpt – DOR's Response Brief at 11.)

* * *

The following are excerpts from Appellant's Opening Brief before the Montana State Tax Appeal Board dated May 27, 1999:

ARGUMENT

It is well settled in the United States that individual income earned by an Indian person and derived wholly from reservation sources is exempt from state income tax. ***McClanahan v. State Tax Commission of Arizona***, 411 U.S. 164 (1973). This holding was adopted as the law of the state of Montana in 1978 by the Montana Supreme Court in ***LaRoque v. State of Montana***, 178 Mont. 315, 583 P.2d 1059 (1978). In ***LaRoque*** the State of Montana went one step further and held that Indian persons who were not enrolled could claim exempt status of income earned from wholly on-reservation activity. ***LaRoque***, arose also from the Fort Peck Indian Reservation where Flat Center Farms, Inc. is engaged in farming. ***LaRoque*** and the facts of this case are analogous. In ***LaRoque***, the State in the face of the ***McClanahan*** decision contended that the taxpayers while Indian, were still subject to state income tax because they were not "enrolled" Indians. (Excerpt – Appellant's Brief at 2-3.)

* * *

(2)

Supreme Court, U.S.
FILED
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No. 02-464

In The Supreme Court of the United States

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Petitioner,

v.

FLAT CENTER FARMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTION PRESENTED

Respondent submits that the following question more accurately reflects the nature of the issues to be considered by this Court:

Did the Montana Supreme Court correctly hold (in accordance with its own and with this Court's precedent and in accordance with Montana's established history of deference to tribal authority on matters of essential importance to tribes and their members) that Montana was precluded from enforcing a state licensing tax on an Indian-owned family farm doing business in Indian country and exclusively on Indian-owned lands, when the farm was also incorporated under the laws of the State of Montana?

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I. STATEMENT OF THE CASE

Petitioner's brief contains certain allegations of fact and law which are inaccurate or are, at the very least, misleading. Pursuant to Supreme Court Rule 15(2), respondent offers the following corrections to the record:

- Petitioner alleges that "Mr. and Mrs. Murray are both Indians, though only Mr. Murray is an enrolled member of the Fort Peck Tribes. . . . " Petition for Writ of Certiorari ("Pet. for Cert.") 4. In fact, Mrs. Murray is also an enrolled Indian person. She is an enrolled member of the Turtle Mountain Chippewa. Stip. Facts ¶ 3 (P. App. 29).[1] The Turtle Mountain Chippewa are served by the Fort Peck Reservation. *Id.*

- Petitioner alleges that " . . . some of the land leased by (Flat Center Farms) is land owned by the Tribe, some being trust land." Pet. 5. In fact, all lands operated by Flat Center Farms are Indian-owned. Stip. Facts ¶ 7 (P. App. 30). The bulk of the lands operated by Flat Center Farms are held in trust by the United States for various Indian individuals and for the Tribes. *Id.*

- Petitioner alleges that the Roosevelt County District Court based its conclusion that Flat Center Farms is exempt from the state license tax on two factors. Pet. 6. These two factors, according to petitioner, were "that the operations (of Flat Center Farms) were on the reservation and the beneficiaries of the corporate business were Indians." *Id.* In fact, the district court considered three factors, which are listed in the underlying opinion as follows:

---

[1] P. App. connotes a citation to petitioner's appendix. Citations to respondent's appendix will be indicated by a citation to R. App.

1) The beneficiaries of the income whether corporate or personal are ultimately Indian persons;

2) The situs of the activity generating the income is wholly within the reservation; and

3) The assets generating the income are Indian trust lands.

P. App. 25-26.

- Petitioner characterizes the decision of the Montana Supreme Court as grounded in "its understanding of federal Indian law." Pet. 11. The decision below was actually based largely on the Montana Supreme Court decision in *LaRoque v. State of Montana*, 583 P.2d 303 (Mont. 1978). As respondent will explain in more detail below, neither the *LaRoque* decision nor the *Flat Center Farms* decision are in conflict with the jurisprudence of this Court. However, *LaRoque* and *Flat Center Farms* both reflect Montana's established policy of deference to tribal sovereignty.

II. REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT BETWEEN THE *FLAT CENTER FARMS* OPINION AND ANY OTHER PUBLISHED OPINION FROM EITHER ANY FEDERAL APPELLATE COURT OR THE HIGHEST APPELLATE COURT OF ANY STATE.

1. *Baraga* Is Not Binding Authority And Furthermore Is Not In Conflict With *Flat Center Farms*.

In an unpublished decision, the Sixth Circuit held that a corporation, which was founded primarily by

non-Indians but which was eventually wholly Indian-owned, was subject to state tax. *Baraga Prods., Inc. v. Michigan Comm'r of Revenue*, 156 F.3d 1228, 1998 WL 449674, *1 (6th Cir. 1998).[2] Petitioner contends that the *Baraga II* opinion is in direct conflict with the *Flat Center Farms* opinion on an important issue of federal law. For several reasons, this argument is flawed.

Unpublished decisions issued by the Sixth Circuit are not intended as binding authority:

> Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

6th Cir. R. 28(g) (R. App. 1).

In determining whether an opinion should be published, and should therefore have significant precedential value, the Sixth Circuit considers numerous and exhaustive factors:

1) Whether (the opinion) establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

2) Whether (the opinion) creates or resolves a conflict or (sic) authority either within the

---

[2] For purposes of clarity, this opinion will be referred to as "*Baraga II*," and the district court opinion below, *Baraga Prods., Inc. v. Comm'r of Tax Revenue*, 971 F.Supp. 294 (W.D. Mich. 1997), will be referred to as "*Baraga I*."

circuit or between (the Sixth Circuit) and another;

3) Whether (the opinion) discusses a legal or factual issue of continuing public interest;

4) Whether (the opinion) is accompanied by a concurring or dissenting opinion;

5) Whether (the opinion) reverses the decision below, unless:

   A) the reversal is caused by an intervening change in law or fact; or,

   B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

6) Whether (the opinion) addresses a lower court or administrative agency decision that has been published; or

7) Whether (the opinion) is a decision that has been reviewed by the United States Supreme Court.

6th Cir. R. 206 (R. App. 2).

The judgment exercised by the Sixth Circuit Court of Appeals in designating the *Baraga II* opinion as unpublished should not be taken lightly. This choice is an expression on the part of the Court of Appeals that the opinion should not be regarded as the last word on the issues which the Court addressed, and should therefore not be relied upon as binding authority. Indeed, in determining whether to publish its decision, the Sixth Circuit necessarily considered whether the issues presented in *Baraga II* were of "continuing public interest." *Id.* at (3).

The *Baraga* opinions are also distinguishable on their facts. In these cases, the subject corporation was founded by four initial stockholders, only one of whom was Indian. Thus, the corporation was 75% owned by non-Indians at its inception. 1998 WL 449674 at *1. The State of Michigan began collecting taxes in 1984, but the corporation was not fully Indian-owned until 1993. *Id.*; 971 F.Supp. at 295. This is in sharp contrast to the case at bar. At its inception, and even before incorporation, Flat Center Farms was an Indian-owned business. Stip. Facts ¶ 8 (P. App. 30).

Furthermore, as the Montana Supreme Court noted, it is not clear from the record whether the entirety of Baraga's business operations were conducted on-reservation. P. App. 9. Flat Center Farms has always operated on the Fort Peck Reservation. *Id.* at ¶ 6. (P. App. 29).

2. *Airvator* Is Factually Distinct

Petitioner asserts that the *Flat Center Farms* opinion conflicts with a published opinion issued by the North Dakota Supreme Court. *See Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596 (N.D. 1983). Like *Baraga II*, *Airvator* is materially distinguishable from the case at bar.

First, *Airvator* is not a case which addresses the scope of a state's authority to tax Indian commerce. *Airvator* involved a suit brought by a non-Indian corporation against a corporation which was partially Indian-owned. In order to determine whether the trial court had jurisdiction over the parties, the North Dakota Supreme Court was called upon to define the term "Indian." 329 N.W.2d at 600-01. The Court concluded that a state-chartered

corporation doing business in Indian country was not an "Indian" entity such that state jurisdiction was precluded. *Id.* at 602. Significantly, the Court did not reach the question of federal preemption for tax purposes.

The *Airvator* case also involved facts which differed substantially from those at issue in the *Flat Center Farms* matter. In *Airvator*, the company seeking "Indian" status was 51% Indian-owned. *Id.* at 600. By contrast, Flat Center Farms is wholly-owned by enrolled Indian stockholders. Stip. Facts ¶ 4 (P. App. 29). Moreover, the *Airvator* opinion does not reveal whether all business conducted by the subject corporation was conducted in Indian country, nor whether the subject corporation was tribally-chartered. Flat Center Farms is a tribally-chartered company operating on land which is exclusively Indian-owned and which is wholly situated within the external boundaries of the Fort Peck Reservation. *Id.* at ¶¶ 2, 6, 7 (P. App. 29-30).

Finally, and of great significance, the analysis in *Airvator* regarding "Indian" status did not rest primarily on the jurisprudence of this Court. Instead, the Supreme Court of North Dakota relied heavily on state law and on Felix S. Cohen's seminal, if substantially outdated, *Handbook on Federal Indian Law*.[3] *See, e.g.*, 329 N.W.2d at 602 ("We agree with the statements in Cohen that, for purposes of jurisdictional analysis, state-chartered corporations should be treated as non-Indians independent of their percentage of Indian shareholders.")

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[3] F. Cohen, *Handbook on Federal Indian Law* (1982 ed.).

Petitioner's assertions notwithstanding, *Airvator* does not reach an "important question of federal law" as required under Supreme Court Rule 10(b).

B. THERE IS NO CONFLICT BETWEEN THE *FLAT CENTER FARMS* OPINION AND ANY RELEVANT DECISION OR DECISIONS OF THE UNITED STATES SUPREME COURT.

The case at bar is factually distinct from all other Supreme Court cases which address the states' authority to tax commerce occurring in Indian country. Flat Center Farms is an Indian entity doing business solely in Indian country. This family-owned business is inextricably linked with the Fort Peck Tribe and with the Fort Peck Reservation. To characterize the facts to the contrary is, as the District Court below indicated, an elevation of "form over substance." P. App. 26. The stipulated facts which establish Flat Center Farms as a Fort Peck Indian entity are as follows:

- Flat Center Farms is co-owned by Kim and Denise Murray, each of whom have a 50% ownership interest in the farm. Stip. Facts ¶ 4 (P. App. 29).
- Denise and Kim Murray are a married couple. *Id.* at ¶ 3.
- Kim Murray is an enrolled member of the Fort Peck Tribes. *Id.*
- Denise Murray is an enrolled member of the Turtle Mountain Chippewa. *Id.*
- The Turtle Mountain Chippewa are served by the Fort Peck Reservation. *Id.*

- Flat Center Farms operates solely on land which is owned by Fort Peck Indians or which is held in trust for the Fort Peck Tribes or for individual tribal members. *Id.* at ¶ 7 (P. App. 30).
- All land farmed by Flat Center Farms exists within the exterior boundaries of the Fort Peck Reservation. *Id.* at ¶ 6 (P. App. 29).
- Flat Center Farms' sole business activity is farming. *Id.* at ¶ 5 (P. App. 29).
- The lands currently farmed by Flat Center Farms were previously farmed by Kim Murray individually. When these lands were farmed by Kim Murray individually, rather than by his Indian-owned small business, the income from his farming operation was tax-exempt. *Id.* at ¶ 8 (P. App. 30).
- Flat Center Farms is a tribally-chartered corporation. *Id.* at ¶ 2 (P. App. 29).

Flat Center Farms is owned by, and run by, an enrolled member of the Fort Peck Tribe and an enrolled member of a tribe with a recognized beneficiary relationship to the Fort Peck Tribe. Flat Center Farms exists on the Fort Peck Reservation and exclusively farms land owned by the Tribe or held in trust for the Tribe and its members. The State of Montana argues that because Flat Center Farms is *also* state incorporated, that it should be subject to state taxation. There is no jurisprudence from this Court which so mandates. Petitioner relies on cases which are materially distinguishable from the case at bar.

For example, petitioner cites to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). *Colville* is not in conflict with this case. In

Colville, this Court determined that the State of Washington could properly tax cigarette purchases where the transactions occurred on-reservation *but the consumers were not members of the reservation's governing tribe*. 447 U.S. at 160 (emphasis added). Significantly, *Colville* involved tribal commerce designed to attract non-Indian and non-reservation consumers. *Id.* at 155. In the same decision, this Court struck down a Washington State vehicle tax to the extent it was applied to reservation-Indians, even when those vehicle owners used their vehicles, in part, off-reservation. *Id.* at 163.

Similarly, the decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), is not in conflict with the case at bar. In *Oklahoma Tax Comm'n*, this Court held that the State of Oklahoma could properly tax tribal members who worked for the tribe *but who resided off-reservation*. 515 U.S. at 453 (emphasis added). In the same decision, this Court struck down an Oklahoma tax on motor fuel sold by the Chikasaw tribe on-reservation. *Id.* In so holding, the Court noted that the "legal incidence" of the motor fuel tax fell on the tribe.

Petitioner also relies on the case of *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). *Cotton Petroleum* is not in conflict with the case at bar. In *Cotton Petroleum*, this Court affirmed the right of the State of New Mexico to tax the production of oil and gas by *non-Indian lessees* of wells located on-reservation. 490 U.S. at 186 (emphasis added).

Finally, petitioner attempts to compare the case at bar with the matter of *Arizona Dep't. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999). In *Blaze*, this Court held that the State of Arizona could tax a company which was

owned by a member of the Blackfeet Tribe and which had contracted with the Federal Government to perform work on various reservations. 526 U.S. at 39. Significantly – and in sharp contrast to the case at bar – *none of Blaze's work was performed on the Blackfeet reservation. Id.* at 34 (emphasis added).

The holding of the Montana Supreme Court is consistent with each of the above cases and is also consistent with this Court's benchmark decision in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). In *McClanahan*, this Court held that a State may not impose a tax on "reservation Indians with income derived solely from reservation sources." 411 U.S. at 165.[4] None of the cases cited by Petitioner suggest that Flat Center Farms should be treated as anything other than a reservation-Indian entity for purposes of State taxation.

The State has not sought to tax Flat Center Farms for the time period after the business became tribally-chartered. This appears to be an implicit concession that Flat Center Farms became a Fort Peck Indian entity at the time of Tribal incorporation. The State cannot credibly suggest that the mere fact of tribal incorporation somehow changed Flat Center Farms from a non-Indian to an Indian entity.

In fact, Flat Center Farms has always been, and remains, a Fort Peck Indian entity. As such, Flat Center

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[4] A State may tax this type of income if Congress specifically authorizes such a tax. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). However, there is no issue of Congressional authorization in the case at bar.

Farms is not subject to state taxation. The Montana Supreme Court has simply stated the obvious, and in doing so has created no conflict with the jurisprudence of this Court.

C. THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUPPORT THE MONTANA SUPREME COURT'S DECISION.

1. The Montana Supreme Court appropriately relied on state law in reaching its decision.

In *Flat Center Farms*, the Montana Supreme Court determined that Indian sovereignty is a bar to the state taxation of an Indian-owned business operating in Indian country when the business is also state-licensed. This Court should defer to the Montana Supreme Court's conclusions regarding the relationship between the State of Montana and the Indian population of that state.

While the *Flat Center Farms* opinion is not in conflict with Federal Indian law, the Montana Supreme Court relied heavily on its own jurisprudence in reaching the conclusion that Flat Center Farms is exempt from Montana's business license tax. Because the Montana court relied upon a long line of cases, and because this reliance on state law is important, the relevant passage from the *Flat Center Farms* opinion is herein quoted in full:

> The point here is that the State should not be presumed to wield the sword of on-reservation tax authority absent an express Congressional provision. *While we have not previously addressed the precise issue in this case, this Court*

> *has repeatedly recognized the need to promote tribal self-determination by deferring to tribal authority on matters of essential importance to tribes and their members. See, e.g., In re Marriage of Skillen*, 1998 MT 43, ¶ 41, 287 Mont. 399 ¶ 41, 956 P.2d 1, ¶ 41 (recognizing tribal sovereignty and the right of self-government include authority to control the internal relations of tribal members); *Balyeat Law, P.C. v. Pettit*, 1998 MT 252, ¶ 36, 291 Mont. 196, ¶ 36, 967 P.2d 398, ¶ 36 (holding that Montana courts lack subject matter jurisdiction over debt collection action brought by non-Indian creditor whose rights arose on reservation); *In re Adoption of Riffle* (1995), 273 Mont. 237, 242, 902 P.2d 542, 545 (holding that the tribe is the ultimate authority on eligibility for tribal membership). Furthermore, we have considered whether tribal membership is critical to a determination of whether the State can tax income earned by Indians on tribal land. *See LaRoque v. State* (1978), 178 Mont. 315, 583 P.2d 1059 (holding that tribal membership was not determinative).

P. App. 7 (emphasis added; citations as they appear in original).

Further evidence of Montana's intent to decide the Flat Center Farms case against the unique backdrop of state law and policy can be found in the Court's treatment of the *Baraga I* opinion.[5] In distinguishing *Baraga I*, the Montana Supreme Court noted that "the precise language

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[5] Perhaps in recognition of the fact that *Baraga II* was unpublished, the Montana Supreme Court reserved its comments to the analysis set forth in *Baraga I*.

of the Michigan business tax" at issue before the federal district court was not apparent from the *Baraga I* opinion. P. App. 9. In focusing on this factual distinction, the Montana court implicitly emphasized the fact that the reach of a state taxation scheme directly flows from the law of that particular state.

Montana has adopted numerous pieces of legislation which serve to protect its Indian residents from the excessive reach of state taxation. *See, e.g.*, Mont. Code Ann. § 15-72-104(3)(b) (no state taxation of electricity produced on-reservation for delivery outside the state) (R. App. 4); Mont. Code Ann. § 16-11-111 (no state taxation of cigarette sales to Indian consumer if the sale is made on the consumer's reservation) (R. App. 5); Mont. Code Ann. § 18-11-101 (statement of policy which seeks to "prevent the possibility of dual taxation by governments while promoting state, local, and tribal economic development.") (R. App. 7).

In addition to its laws regarding the imposition of state taxes in Indian country, Montana has adopted law and policy which promote tribal sovereignty generally. *See, e.g.*, Mont. Code Ann. § 90-11-101 (legislative policy promoting Indian sovereignty) (R. App. 9); Ch. 309, L. 1981, preamble (HB 25) (codified at Mont. Code Ann. §§ 18-11-101 *et seq.*) (promoting relationship between the state and the Tribes that is based on "mutual consent and mutual benefit.") (R. App. 8).

The Montana Supreme Court relied heavily on its own jurisprudence in determining that the state was barred from imposing its licensing tax on Flat Center Farms. This decision was in harmony with not only the Montana Supreme Court's prior rulings, but also with the legislative

scheme in force in Montana. The Montana Supreme Court has not created a conflict with this Court's jurisprudence, nor with the jurisprudence of any other state supreme court or federal appellate court, on any important issue of federal law. The Montana Supreme Court's decision interpreting state law and affecting state citizens should not be disturbed.

2. The result achieved by the Montana Supreme Court did not differ from the result which would have been reached in explicit reliance on this Court's jurisprudence.

Petitioner argues that the Montana Supreme Court erred in failing to apply the "legal incidence" test as set forth in *Oklahoma Tax Comm'n*. Under *Oklahoma Tax Comm'n*, a state tax cannot be enforced –absent Congressional authorization – if the legal incidence of the tax "rests on a tribe or on tribal members for sales made inside Indian country." *Id.* "But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax." *Id.*

While the Montana Supreme Court did not explicitly cite the "legal incidence test" set forth in *Oklahoma Tax Comm'n*, the result would have been the same even if it had. Under *Oklahoma Tax Comm'n*, the judiciary is called upon to evaluate the "legal incidence" of a tax in order to determine whether the tax burdens Indian or non-Indian taxpayers. 515 U.S. at 458. Here, the Montana Supreme Court concluded, in essence, that the legal incidence of the Montana tax fell solely on Indian taxpayers. The Montana Supreme Court applied the "legal situs" test first adopted in *LaRoque v. State of Montana*, 583 P.2d 1059 (1978), in

reaching this conclusion. However, as explained more fully in Section II.B., *supra*, the Montana Supreme Court's conclusions are not in conflict with any of this Court's jurisprudence. Indeed, while not as artfully stated, the "legal situs" test mirrors in substance the "legal incidence" test set forth by this Court in *Oklahoma Tax Comm'n*. It is simply wrong to suggest that Flat Center Farms is, in substance, anything other than a Fort Peck Indian entity. As such, the legal incidence of Montana's business license tax falls on an impermissible party.

D. THE LIMITED NATURE OF THE RECORD RENDERS THE *FLAT CENTER FARMS* OPINION POTENTIALLY INAPPLICABLE TO THE MAJORITY OF CORPORATIONS WHICH MIGHT OTHERWISE BE AFFECTED BY THE MONTANA COURT'S RULING

It is significant to note that Flat Center Farms is not only incorporated under the laws of the State of Montana, but is also a tribally-chartered corporation. Stip. Facts ¶ 2 (P. App. 29). It is true that during the time period relevant to this litigation, Flat Center Farms was incorporated only pursuant to state law. *Id.* However, the State failed to argue that point before the Roosevelt County District Court. *See* P. App. 23 (Gray, J., concurring). Because the State failed to make its record on this issue, and because this matter was litigated on stipulated facts, the State is bound by the record, which clearly establishes Flat Center Farms' status as a tribally-chartered corporation. *Id.* Thus,

the record supports the conclusion that Flat Center Farms does, in fact, have "Indian" status.[6]

This Court should not disturb the findings of the Montana courts. In the absence of exceptional circumstances, this Court defers to state court factual findings, even when those findings relate to a constitutional issue. *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

E. THE *FLAT CENTER FARMS* OPINION ADDRESSES AN ISSUE OF LAW WHICH IS WELL-SETTLED AND WHICH DOES NOT REQUIRE FURTHER CLARIFICATION BY THIS COURT.

Petitioner suggests that the Supreme Court of Montana erred in failing to apply explicitly the "legal incidence" test as set forth in *Oklahoma Tax Comm'n*. Respondent believes that the Supreme Court of Montana reached the correct result under both state and federal law. *See* Sections II.B and II.C, *supra*. However, the putative error of the Montana Supreme Court in failing to apply explicitly the test set forth in *Oklahoma Tax Comm'n*, would not require the intervention of this Court. The rule of the *Oklahoma Tax Comm'n* case is black letter law and does not require further clarification. The Court has made it clear that the rule of *Oklahoma Tax Comm'n* is a "categorical" one. *Id.* The failure of a state court to apply a clearly defined rule of federal law is not, in most cases, a basis for this Court to accept jurisdiction over an

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[6] Even the State appears to concede that tribal incorporation gives a business the status of an Indian entity. *See* Section III.B., *supra*.

appeal. There is no compelling reason to grant a writ of certiorari in this case.

CONCLUSION

The Supreme Court of Montana reached the correct result in this matter. The *Flat Center Farms* decision was in keeping with the jurisprudence of this Court, and was in keeping with Montana's own jurisprudence regarding the sovereignty of its Indian population. The petition should be denied.

DATED this 23rd day of October, 2002.

Respectfully submitted,

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APPENDIX

Sixth Circuit Rule 28 provides in relevant part:

(g) Citation of Unpublished Decisions. Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court. Such service shall be accomplished by including a copy of the decision in an addendum to the brief.

Sixth Circuit Rule 206 provides:

(a) Criteria for Publication.

The following criteria shall be considered by panels in determining whether a person will be designated for publication in the Federal Reporter:

(1) whether it establishes a new rule of law, or alters or modifies and an existing rule of law, or applies an established rule to a novel fact situation;

(2) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;

(3) whether it discusses a legal or factual issue of continuing public interest;

(4) whether it is accompanied by a concurring or dissenting opinion;

(5) whether it reverses the decision below, unless:

(A) the reversal is caused by an intervening change in law or fact, or

(B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court.

(6) whether it addresses a lower court or administrative agency decision that has been published; or,

(7) whether it is a decision that has been reviewed by the United States Supreme Court.

(b) Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.

(c) Published Opinion Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

Section 15-72-104 of Montana Code Annotated provides in pertinent part that:

(b) Electricity produced in the state by any agency of the United States government or electricity produced from an electric energy generation facility, as defined in 90-5-101(3), constructed after May 1, 2001, that is within the exterior boundaries of a Montana Indian reservation for delivery outside of the state is exempt from the tax imposed by this section.

Section 16-11-111 of Montana Code Annotated provides:

16-11-111. Cigarette sales tax – exemption for sale to tribal member

(1) (a) A tax on the purchase of cigarettes for consumption, use, or any purpose other than resale in the regular course of business is imposed and must be precollected by the wholesaler and paid to the state of Montana. The tax is 18 cents on each package containing 20 cigarettes and, when packages contain other than 20 cigarettes, a tax on each cigarette equal to 1/20th the tax on a package containing 20 cigarettes.

(b) The tax computed under subsection (1)(a) applies to illegally packaged cigarettes under 16-11-307.

(2) The tax imposed in subsection (1) does not apply to quota cigarettes.

(3) Subject to the refund or credit provided in subsection (4), the tax must be precollected on all cigarettes entering a Montana Indian reservation.

(4) Pursuant to the procedure provided in subsection (5), a wholesaler making a sale of cigarettes to a retailer within the boundaries of a Montana Indian reservation may apply to the department for a refund or credit for taxes precollected on cigarettes sold by the retailer to a member of the federally recognized Indian tribe or tribes on whose reservation the sale is made. A wholesaler who does not file a claim within 1 year of the shipment dates forfeits the refund or credit.

(5) The distribution of tax-free cigarettes to a tribal member must be implemented through a system of

preapproved wholesaler shipments. A licensed Montana wholesaler shall contact the department for approval prior to the shipment of the untaxed cigarettes. The department may authorize sales based on whether the quota, as established in a cooperative agreement between the department and an Indian tribe or as set out in this chapter, has been met. If authorized as a tax-exempt sale, the wholesaler, upon providing proof of order and delivery to a retailer within the boundaries of a Montana Indian reservation selling cigarettes to members of a federally recognized tribe or tribes of that reservation, must be given a credit or refund. Once the quota has been filled, the department shall immediately notify all affected wholesalers that further sales on that reservation must be taxed and that a claim for a refund or credit will not be honored for the remainder of the quota period. Quota allocations are not transferable between quota periods or between reservations.

(6) The total amount of refunds or credits allowed by the department to all wholesalers claiming the refund or credit under subsection (4) for any month may not exceed an amount that is equal to the tax due on the quota allocation. The department shall determine the amount of refunds or credits for each Indian reservation at the beginning of each fiscal year, using the most recent census data available from the bureau of Indian affairs or as provided in a cooperative agreement with the tribe or tribes of the Indian reservation.

Section 18-11-101 of Montana Code Annotated provides:

18-11-101. Short title – purpose

(1) This chapter shall be known and may be cited as the "State-Tribal Cooperative Agreements Act".

(2) It is the intent of the legislature that this part be used to promote cooperation between the state or a public agency and a sovereign tribal government in mutually beneficial activities and services.

(3) It is the goal of the legislature to prevent the possibility of dual taxation by governments while promoting state, local, and tribal economic development.

Ch. 309, L. 1981, preamble (HB 25) (codified at Mont. Code Ann. §§ 18-11-101, *et seq.*) provides:

WHEREAS, it is in the best interest of the State of Montana to establish a legal framework that will enable this state, its political subdivisions, and Indian tribes to achieve maximum harmony and facilitate cooperative efforts in the orderly administration of their respective governments; and

WHEREAS, it is in the best interest of the state of Montana to establish a legal framework for viable agreements between itself and tribal governments located in Montana that are based on mutual consent and mutual benefit; and

WHEREAS, it is in the best interest of the state of Montana to permit public agencies to make the most efficient use of their powers by enabling them to cooperate with tribal governments on a basis of mutual benefit and thereby provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of public agencies and local communities.

Section 90-11-101 of Montana Code Annotated provides:

The legislature finds and declares that:

(1) a considerable portion of the citizens of the state of Montana are American Indians;

(2) since statehood, Indian citizens of the state of Montana have lived on reservations set apart for those purposes by the United States of America, and by virtue of their isolation and supervision by the federal government, great problems of economic and social significance have arisen and presently exist;

(3) the best interests of Montana Indian tribes will be served by engaging in government-to-government relationships designed to recognize the rights, duties, and privileges of full citizenship that Indians are entitled to as citizens of this state;

(4) because the tribes are domestic dependent nations, agencies of the federal government retain jurisdiction and fiduciary duty throughout the state of Montana for the administration of economic, social, health, education, and welfare programs for Indians;

(5) unique differences exist between the tribes, their reservations, customs, treaties, and their respective relationships with the federal government, all of which influence the relationships among tribes and between the tribes and the state;

(6) there are sizeable numbers of off-reservation enrolled and unenrolled Indians residing in our state whose needs for social, environmental, educational, and

economic assistance are borne in part by state and local agencies;

(7) programs of the state of Montana should not duplicate those supported by agencies of the federal government or tribal governments with regard to jurisdiction of Indian people, because state responsibility includes off-reservation Indians and because those Indians require assistance to coordinate their affairs with various tribal groups and federal agencies where they have no official recognition;

(8) the state and the tribes working together in a government-to-government relationship and engaging in compacts and other cooperative agreements for the benefit of Indian and non-Indian residents will promote economic development, environmental protection, education, social services support, and enduring good will;

(9) to facilitate the discussion and resolution of issues and concerns that Indian tribes have in relation to the state, the federal government, and among themselves, the coordinator of Indian affairs shall:

(a) maintain effective tribal-state communications;

(b) assess tribal and individual Indian concerns and interests to seek ways and means of communicating these concerns and interests to relevant state agencies and to the legislature and actively assist in organizing these efforts; and

(c) act as a liaison for tribes and Indian people, whether the Indian people reside on or off reservations, whenever assistance is required;

(10) the coordinator of Indian affairs shall endeavor to assist tribes to seek agreements between the state and tribes and to work toward a consensus among the tribes and other parties on shared goals and principles.

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No. 02-464

(3)

In The
Supreme Court of the United States

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Petitioner,

v.

FLAT CENTER FARMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

REPLY BRIEF

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INTRODUCTION

Respondent's brief ignores the determining factor in this case: the taxpayer, as a corporate entity separate from its shareholders and incorporated only as a Montana state corporation,[1] is not a tribal member for purposes of federal Indian taxation preemption analysis. There is no federal authority that impliedly preempts Montana's corporate tax laws on the basis of a corporate shareholder's immunity and the reservation-based situs of corporate commercial activity. Because of the importance of the core state power of taxation, the ongoing significance of on-reservation private commercial activity, the Montana court's conflict with the Sixth Circuit Court of Appeals and the Supreme Court of North Dakota, and its clear departure from this Court's jurisprudence, this Court should accept certiorari.

REPLY ARGUMENT

1. While the Montana court relied, in part, on its own previous rulings, those decisions were based upon federal law, not on independent state law grounds. In *LaRoque v. State of Montana*, 178 Mont. 315, 583 P.2d 1059 (1978), the Montana court held *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), controlling, concluding that state taxation of reservation Indians interferes with matters that, " . . . the relevant treaty and statutes leave to the *exclusive province of the Federal Government* and the Indians themselves." *LaRoque* at 321 (emphasis added). The court also cited to a plethora of federal case law, including *Williams v Lee*, 358 U.S. 217 (1959), and, oddly enough, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). It also cited other of its decisions interpreting

[1] For the tax year in question, Flat Center Farms was not tribally recognized and existed only as a Montana corporation. (Cert Pet. App. 3-4).

federal preemption of state law through the supremacy clause and Congressional plenary authority over Indians, *e.g.*, *Balyeat Law, P.C. v. Pettit*, 1998 MT 252, 291 Mont. 196 (interpreting federal preemption under *Williams v. Lee*, 358 U.S. 217, 223 (1959)). These cases demonstrate the court's acceptance of the primacy of federal law.

Respondent's recitation of Montana statutes as providing independent state law grounds for the decision below is misplaced for three reasons: (1) the Montana Supreme Court did not rely on the statutes; (2) the Montana legislature has shown its willingness to adopt state laws which protect Indian persons; and, (3) the Montana legislature has not seen fit to exempt from the corporate license tax corporations owned by Indians.

2. The Montana court has decided an important matter of federal Indian preemption law in a manner that conflicts with a ruling from a United States appellate court. That *Baraga Products Inc. v. Michigan Commissioner of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd,* 156 F.3d 1228 (6th Cir. 1998) unpublished opinion reported at 1998 U.S. App. LEXIS 17498, is unpublished is irrelevant to its validity. *Baraga* articulated the rule for the specific question of whether the tax exemption for an Indian shareholder may flow through to a private commercial corporate entity incorporated under state law. Its significance is in its specificity, not its presumed novelty.

Respondent omitted a critical portion of Sixth Circuit Rule 28(g) that provides in pertinent part, "If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited. . . . " (Resp. Brief, App. 1). Reliance on unpublished opinions is appropriate where, as here, the facts are nearly identical to facts in an unpublished opinion. *Oveido v. Jago*, 809 F.2d 326, 329 (6th Cir. 1986), n.3.

There are no material differences of fact between *Baraga*, *Airvator v. Turtle Mountain Manufacturing Co.*,

329 N.W.2d 596 (1983), and the case at bar. Both the Court of Appeals in *Baraga* and the North Dakota Supreme Court in *Airvator* concluded that shareholder privileges arising under federal Indian law do not flow to a corporate entity doing business on a reservation, a conclusion in conflict with that of the Montana court.

3. Respondent's argument for a lack of conflict between the Montana decision and this Court's rulings avoids the separate corporate identity, the fact that it was not a tribal corporation for the year in issue, and the fact that Mrs. Murray is not a member of the Fort Peck Tribes. As this Court ruled in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980), the relevant inquiry for tax preemption is not whether an individual is an Indian entitled to social services on a reservation, but rather whether an individual is an enfranchised member of the body politic of the governing tribes. *Id.* at 160-61.

In conflict with this Court's rulings, the Montana court ignored the corporate identity and addressed the preemption issue as if the shareholders were the taxpayer. *Moline Properties v. Comm'r of Internal Revenue*, 319 U.S. 436 (1943). The Montana court wrongly ruled that federal law silently preempts state activity on reservations as interfering with the Indians right to make their own laws and be governed by them. (Pet. Cert. App. 6) *Nevada v. Hicks*, 533 U.S. 353 (2001) (states' jurisdiction does not stop at reservation boundary); *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989) (no implied preemption even when state taxation reduces tribal income).

The Montana court should have conducted a particularized balancing analysis. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 173 (1989). Instead, the Montana court found that preemption must be implied; and concluded that federal law required it to disregard the corporate form and preempt state taxation of nonmembers Denise Murray and Flat Center Farms, Inc. Since the only

tribal interest of record is avoidance of state taxation, balancing the respective state, federal, and tribal interests inescapably leads to the conclusion that the state's interest in regulating and taxing its domestic corporations outweighs any tribal and federal interests. (D.C. Doc. 3; STAB Doc. 7, Ex. B; Cert. Pet. App. 29, 30).

> It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the tribes. See *Moe v. Salish & Kootenai Tribes*, *supra*, at 481, n.17. . . . Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. Similarly the mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934 . . . does not demonstrate a congressional intent to exempt such Indians from state taxation. . . . Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government for the simple reason that nonmembers are not constituents of the governing Tribe. . . . There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interests in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

Colville, 447 U.S. at 161.

Here, the corporation is not an enfranchised citizen of a body politic with which the federal government has a treaty relationship. It is a fictional corporate commercial entity organized, for the 1993-1994 tax year, solely under Montana state corporation statutes.

The majority of courts that have addressed federal preemption of state taxation of reservation activities have held that federal preemption of state tax authority will not be inferred simply from factors found determinative by the Montana court. *Cotton Petroleum*, *supra*; *Yavapai-Prescott Indian Tribe v. Scott, et al.*, 117 F.3d 107 (1997), *cert. denied*, 522 U.S. 1076 (1998); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (1996). It is Montana's significant disconnect in this important area of federal law that compels the conclusion that this Court should grant certiorari.

CONCLUSION

Disputes involving the balancing of interests between the core state function of taxation and any federal and tribal interest in immunizing private commercial activities within reservations from state regulation are among the most important federalism issues this Court addresses. The Montana court's decision directly conflicts with this Court's recent jurisprudence, a decision of a United States Court of Appeals and the Supreme Court of North Dakota, and indirectly with the decisions of several federal and state courts. This Court should grant certiorari to resolve the conflict.

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